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In The
Supreme Court of the United States

October Term, 1993

ANNAPOLIS ROAD, LTD.,

Petitioner,

vs.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

WILLIAM E. SEEKFORD, ESQ.
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28 Allegheny Avenue
Towson, Maryland 21204
(410) 821-6868
Counsel for Petitioner

113 pp

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QUESTIONS PRESENTED FOR REVIEW

1. May a trial court, under the facts presented here, issue an ex parte injunction and extend it with an interlocutory injunction totally barring the dissemination of speech materials by way of film exhibition whether licensed or unlicensed, as an "adult arcade" upon the basis that the content of the previous film is as defined in Article 27, Section 416A prior to the trial on the merits which has not commenced?

2. Does this injunction against dissemination of future unadjudicated and unidentified sexual content film with or without a license upon the sole basis of the oral description of the non-obscene sexual content of film previously exhibited, constitute an unconstitutional prohibited prior restraint of First Amendment rights and conflict with Near v. Minnesota, 283 US 697, Freedman v. Maryland, 380 U.S.S., Vance v. Universal Amusement Co., 445 U.S. 308 and that line of cases, and the Fourteenth Amendment?

3. Did the Court of Special Appeals err in upholding the injunction and the enactment and refusing to grant a stay to preserve the states quo when it was shown that three license applications had been filed and one re-submitted but none issued to any such business at anytime since the law was first enacted in 1977?

4. Did the Court of Special Appeals err in rejected Petitioner's claim the licensing ordinance, was unconstitutional for the reasons presented, but not limited to, the unbridled absolute discretion of the Licensing Director to accept as proper and to evaluate the license applications as inter alia whether she decided the licensee would create a nuisance, whether the

licensed premises would be detrimental to the welfare of the community and her own mental determinations?

5. Is the licensing ordinance constitutionally invalid for imposing a prohibited discriminatory tax upon the right to engage in protected First Amendment dissemination?

RULE 28, 1 LIST AND PARTIES TO THE PROCEEDINGS

Defendant-Petitioner, Annapolis Road Ltd, is incorporated and exists under the Laws of Maryland and is authorized to do business in the State of Maryland. Annapolis Road. Ltd. has no publicly traded stocks nor parent, subsidiary, or affiliate corporations to list pursuant to Rule 28.1.

Petitioner, Annapolis Road, Ltd. and Respondent, Anne Arundel County, Maryland are the only interested parties in this action.

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OPINIONS AND JUDGMENTS BELOW

1. The exparte Temporary Restraining Order of December 7, 1992 is set out in the Appendix. The interlocutory Injunction Order against Petitioner barring Petitioner, whether licensed or not, from operating an "Adult Arcade" on the premises in Anne Arundel County, was entered on December 18, 1992, (copy set out as Appendix hereto).

2. The Court of Special Appeals by unreported per curiam opinion rendered decision on November 3, 1993 affirming such injunction. The Per Curiam opinion of the Court of Special Appeals is set out as Appendix hereto. The unreported Order of the Maryland Court of Appeals denying certiorari, entered March 9, 1994, is also set out in the Appendix.

FINALITY AND DATE OF MANDATE

The Interlocutory Injunction of the Circuit Court for Anne Arundel County was entered on December 18, 1992. The judgment issuing the injunction of the Circuit Court was final.

The unreported per curiam opinion of the Court of Special Appeals was entered November 3, 1993. Mandate of the Court of Special Appeals issued on December 10, 1993. Certiorari review was denied by the Maryland Court of Appeals on March 9, 1994. Judgment is final below.

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
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Petitioner, Annapolis Road, Ltd., respectfully seeks this Court review of the judgment and Order of the Court of Special Appeals of the State of Maryland rendered in the proceedings below affirming the Oral Opinion and presently ongoing Injunctive Orders (Both the ExParte Temporary Restraining Order and the subsequent Introductory Injunction) barring Petitioner "from using or operating an adult film arcade on the premises" until further order of the Court and its refusal to dissolve the injunctions against Petitioner which has remained in full force and effect since the issuance of the ExParte temporary restraining order issued upon filing of the Respondent's complaint on

December 7, 1992.

Petitioner presents this Court a ex parte injunction of a trial court which was extended and continues to this date, later upheld by the Maryland Appellate Court, which decided a federal questions in a way that conflicts with applicable decisions of this Court and and adverssely impacts upon basic federal constitutional protections of Maryland citizens engaging in protected First Amendment activities.

JURISDICTION

The unreported memorandum opinion of the Court Special Appeals for the State of Maryland was entered November 3, 1993. The Mandate of that court issued on December 10, 1993. See Appendix. The Petition for Writ of Certiorari before the Maryland Court of Appeals to review the judgments below was denied by unreported Order on March 9, 1994. This Petition is being filed on June 7, 1994 and is timely. The Jurisidiction of this Court is invoked under 28 U.S.C. 1257(a), Supreme Court Rule 13.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Amendments One and Fourteen, set out as appendix hereto.

2. Annotated code of Maryland, Article 27, Sections 416-A, set out as appendix hereto.

3. Anne Arundel County licensing ordinance set out as appendix hereto.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Judge H. Chester Goudy, Jr., after issuing an immediate ex parte Temporary Restraining Order against Petitioner, on December 16, 1993 issued his Interlocutory Injunction continuing that order against Petitioner which continues to this day as;

> " ... enjoining it, and any one acting for it or on its behalf, including its employee, Alan Stokes, from using or operating an adult film arcade on the premises ...; and it is FURTHER ORDERED, that this interlocutory injunction shall remain in effect until further order of this Court or until a determination of the merits of the action." (emphasis added)

This injunction issued in enforcement of and as referring to an "adult film arcade" acts to enforece the newly amended "Class Y" license ordinance which defines an "adult film arcade" in Art. 16, ss 2-1101 as a place with one or more display devices which are maintained for commercial entertainment or amusement purposes where the images are characterized by depiction or description of sexual matters as defined in Art. 27, ss416A of the State Code. A display device includes a coin operated film exhibition machine in a display booth as Petitioner provides. It does not include a place with seating capacity of 50 persons per screen. Petitioner has previously applied for such license but none has ever been issued.

In its provisions the County license law adopts the license requirement based upon film content of any "sexual excitement", "sexual conduct", and "sadomasochistic abuse" as defined by the state statute. Because virtually any modern film could be

considered to contain the nonobscene conduct portrayed that is included under ss416A, the Injunction bars Petitioner as to showing film containing even actors in bizarre costumes or as placing of the actors hand upon their own clothed buttock or even touching their own clothed breast, therefore, this content basis conanot constitutionally be utilized for a grant of government licensing for dissemination.

The Injunction issued solely upon the basis that on a prior date some film were observed at the premises with such regulated content. This basis is in direct conflict with the line of decisions from Near v. Minnesota, 283 U.S. 697, Vance v. Universal Amusement Co., 445 U.S. 308, and fails to maintain the status quo in Freedom v. Maryland, 380 U.S. 51, Nebraska Press Asso. v. Stuart, 423 U.S. 1319, and FW/PBS v. Dallas, 493 U.S. 215. The content of the message cannot be made the basis of licensing to authorize the speaker to disseminate such content. United States v. Grace, 461 U.S. 171, 177.

The Court of Special Appeals rejected Petitioners claims that the ordinance failed to specify reasonable, definite and permissible standards to guide the licensing officials and was taxation on speech rights and held the combined flat and graduated immense license fee was not a prohibited additional tax on expression. The Maryland Court of Appeals denied discretionary review.

THE ISSUES WERE PRESENTED BELOW AND PRESERVED FOR REVIEW

Upon the filing of the Defendants Complaint in the trial Court and issuance of the ex parte Temporary Restraining Order, Petitioner filed its Motion to Dismiss and in Opposition to Injunction alleging its invalidity upon federal constitutional

grounds, inter abia that it was (1) an invalid dual taxation on speech rights unrelated to administration expenses and not a general business taxation but based upon content, (2) That the maximum projection booths of 10 was a unconstitutional cap upon rights of dissemination; (3) The compelled filing for and receipt of Respondents Zoning Certificate of Use prior to the right to file for a license with no adequate reasonable and specific standards or guidelines to control the will of the officials was invalid, (4) Administration hearings, pocket veto without related grounds of rejection in order to be attacked on appeal, and other administrative right of arbitrary discretion granted even to when the commencement of filing time periods ran were invalid and a prohibited prior restraint. (5) The licensing law lacked factual support, was content based, lacked narrow tailoring for any supposed evil, was overbroad and fataly overly vague in regulating and licensing speech rights. (6) was more restriction than necessary to achieve any believed objectives (7) imposed intolerable burdens on speech and speech rights and (8) was an invalid prior restraint in issuing such injunction. The trial Court similarily denied the motion. Trial Court Profile Record below pp. 2 and appendix. The Court of Special Appeals was presented the same federal constitutional issues for review but denied them and affirmed the trial court. Motions for Stay were filed in the trial court for the appeal as well as in the appellate court but were denied. Appendix here.

Petitioner presented these same claims to the Maryland Court of Appeals which denied review. Appendix here.

ARGUMENT

A. AN INJUNCTION MAY NOT BE ISSUED BARRING THE EXHIBITION OF ALL FUTURE UNIDENTIFIED FILM BECAUSE OF PREVIOUS EXHIBITION OF UNIDENTIFIED FILM CONTENT ALL OF WHICH IS CLAIMED TO CONTAIN THE DEFINED SEXUAL PORTRAYALS IN ARTICLE 27, SS 416-A

No state can legitimately impose an injunction arising from and based upon the content of a previously disseminated film which, using such content as a judgment, bars all future film being exhibited with similar content pending a final judicial adjudication that such exhibited film is unprotected or compelled to be licensed. Near v. Minnesota, 283 US 697, 51 S.Ct. 625, Bantam Books vs. Sullivan, 327 U.S. 58. This principle against unbridled government licensing prior restraint has been voiced by this Court many times. See Carroll v. Pres. and Comm'rs of Princess Anne, 393 US 175, Organization For a Better Austin v. O'Keefe, 402 US 415, New York Times v. U.S., 403 US 713, Nat. Soc. Party v. Skokie, 432 US 43, Vance v. Universal Amusement Co., 445 US 308.

Therefore this pre-adjudication prior restraint, based upon the unadjudicated content of prior speech works, placed upon all those future exhibited film under this injunction is constitutionally prohibited.

B. THIS ORDINANCE UNCONSTITUTIONALLY GRANTS DISCRETION TO THE LICENSING AUTHORITY AS WRITTEN AND AS CONSTRUED AND AS APPLIED HERE AND THESE PROVISIONS FAIL TO SPECIFICALLY CONTAIN REASONABLE AND PERMISSIBLE SPECIFIC GUIDELINES FOR SUCH ISSUING AUTHORITIES

This ordinances new provisions as well as the existing provisions contained within the general administrative title of Article 16, Sections 1-102 and 1-103 unconstitutionally grant to the Chief of Licensing as admitted by her under oath at the trial hearing of her discretionary power to determine what requirements shall be included in the required application, how much time elapses by her when an application is acceptable in form, and when an investigation is determined by her to even be conducted before issuing a license and even, what the investigation entails, all without specific and reasonable guidelines and criteria for the Chief of Licensing to act upon or even any reasonable short specific times specified as to when to render decision and she can deny the same by pocket veto, without reason, even on appeal before the Board of Appeals.

An application for a license required by this title must be signed and sworn to by the applicant on the form required by the Department. The Department is not required to make an investigation before the issuance of a license and may refuse to issue the license on the basis of the facts disclosed by the application. If on investigation by the Department it is found that the person requesting the issuance of a license required by this title had made a false statement in the application or that the operation of the devices at the proposed premises will create a nuisance or will be detrimental to the peace and welfare of the

community, the Department may deny or revoke the license. (emphasis added). She testified at the hearing she would talk to local community groups to see if the dissemination was a nuisance or thought to be detrimental. Thus a prohibited community veto.

That by federal constitutional law the Court has specifically held that the grant of such discretion to the licensing officials by statute or in practice renders the entire licensing law invalid.

This ordinance as applied by the Chief of Licensing also unconstitutionally grants unbridled discretion to the licensing officials making the peaceful enjoyment of these constitutional freedoms by Defendant contingent upon the uncontrolled will of those officials including, inter alia, requiring (1) the filing of an application in the form prescribed by the department leaving to the discretion of that official what the form required, (2) filing a copy of a "Zoning Certificate of Use" which must be filed, before the issuing official will even receive or consider the application form, which Certificate of Use itself must be applied for on a form prescribed and if not issued within 30 days of application it is considered a denial without any state reasons. See FW/PBS v. Dallas, supra. Such denial can be appealed by the applicant to the County Board of Appeals to be heard and decided within 60 days and if not so decided the denial below is automatically affirmed. Judicial review thereafter is not an expedited one required by Freedman v. Maryland, 380 US 51 and that line of cases and just the denial of a "Zoning Certificate of Use" could extend the time at least well beyond 90 days without expeditious judicial review. Compounding this discretion and unreasonable delay is the further provision that approval or rejection is to be made within 30 days of the receipt of a completed application and zoning certificate but a simple failure to approve or deny the

license is a silent denial without reason or justification and thus cannot be overcome on appeal of the reasons for denial. This was demonstrated below where the applications have been previously filed. The first was sent back in 1982, a second application has bever been acted upon, and the County still has the license fess there to it but has not issued a Class "Y" license or refused to issue a license. The third application in 1991 was held and then sent back as incomplete, was re-submitted with the additional information, but was returned later as no license was being issued due to a moratorium being imposed by that County on any issuance. However, the law making it illegal to exhibit such films without a license which they no longer would then issue was not placed into the same moratrium. The result was that it was illegal to exhibit film without the required license but which license would not be issued by law, making an untenable situtation. In any event, the Defendants have never issued a "Class Y" license to anyone since the law first went into effect in 1977.

C. THE BILL IMPOSES AN UNCONSTITUTIONAL DISCRIMINATORY TAX UPON THE RIGHT TO THE EXERCISE OF A SPECIFIC SEGMENT OF THE FIRST AMENDMENT BOOK AND FILM SALES AND RENTAL DISSEMINATION

The Plaintiffs business, as other similarly situated sellers and renters of publications and video tape film in the county, are made subject to the general government licensing requirements for such businesses. Those general licensing requirements for the sale and rental of goods (publications and video tape film are goods) require a "Traders License" issued in the County and payment of the regulatory license fee. Art. 56, Sect. 2, 32 and a separate one is required for each place of business, Art. 56, Sect. 33.

In addition Petitioner with others is being subjected to the 10 percent Admissions and Amusement taxes on gross income from film exhibition, ordinary income taxes, and sales taxes but only Petitioner is, in addition thereto, subjected to this new flat minimum licensing tax of $2,500.00 for even a single film exhibition piece of equipment or $300.00 per device, whichever is greater. No other businesses faces such massive dual taxation.

The Plaintiff, by this Bill, under Sect. 2-1104 is compelled to obtain a license to operate an "Adult Film Arcade", a segment of all such film exhibition business, based upon the quality and content of its wares.

There has been no proof or evidence presented of administrative costs to administer this license law nor is how such a large sum was determined. In fact the Court below refused

Appellant the right to even examine the Chief of Licensing during her testimony on how the license fee amount was established and what grovernment costs would be incurred as is the required constitutional foundation.

In Forsyth County v. Nationalist Movement, ___ US ___, 112 S.Ct. 2395 (1992) the Supreme Court held that license fee and consequently the law and license it required unconstitutional. The Court found that "the listeners reaction to speech is not a content neutral bases for regulation "when accessing what are necessary expenses. See Boos v. Barry, 485 US 321. That Court specifically held that any "content-based" permit fee cannot be upheld, 112 S.Ct. at 2404. It held a cap of a flat $1,000.00 for all police mob control and administrative expense was not permissible as was even "nominal" fees which were not factually related to affirmatively proven costs incurred in administrators non-discretionary matters, 112 S.Ct. at 2405, citing Murdock v. Penna., 319 US 105. Here there is a minimum flat tax of $12,500.00 for even one exhibition device. In addition see Fernandes v. Limmer, 633 F.2d 619, 632-33. (flat tax not related to expenses invalid).

Finally the fees of both licensing fees and taxes combined are simply an invalid and unconstitutional tax on the liberty of engaging in the dissemination of this product and not a general business license applicable to all such businesses and product regardless of content. See Forsyth Co. v. Nat. Movement, ___ US ___, 112 S.Ct. 2395, Grosjean v. Amer. Press, 297 US 233, 56 S.Ct. 444, Arkansas Writer's Project v. Ragland, 481 US 221, Riley v. Nat. Fed. of the Blind of N.C., 487 US 781.

WHEREFORE, the Petitioner prays this Honorable Court grant the Petition herein and review the decision of the Court of Special Appeals of the State of Maryland upon the issues presented herein which affirmed the issuance of the inspection and to make enforceable and uniform the constitutionally compelled adherence to this Court's prior decisions. For these substantial reasons the uniform adherence to established constitutional structures is both desirable and in the public interest.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

Article 27, Annotated Code of Maryland

NUDITY AND SEXUAL DISPLAYS

Subsection 416A. Definitions

The following words and phrases, as used in this subheading, have the meanings indicated:

(a) "Advertising purposes; means the purpose of propagandizing the connection with the sale commercially of a product or products, or the offering commercially of a service, or the exhibiting commercially of entertainment.

(b) "Minor" means any person under eighteen years of age.

(c) "Sadomasochistic abuse" means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bounds, or otherwise physically restrained.

(d) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) "Sexual excitement" means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in a witnessing sexual conduct or nudity.

Anne Arundel County, Maryland, Code

Article 16

LICENSES AND PERMITS

TITLE 1. DEFINITIONS; GENERAL PROVISIONS

Sec. 1-101. Definitions.

(a) In this article the following words have the meanings indicated.

(b) "Department" means the Department of Inspections and Permits.

(c) "Director" means the Director of Inspections and Permits.

Sec. 1-102. Administration and enforcement.

Except as otherwise provided, the Director and the Department shall administer and enforce the provisions of this article.
(Code 1967, Section 12-402)

Sec. 1-103. Applications for licenses.

To apply for license required under this article, an applicant shall:

(1) submit an application to the Department on the form that the Department requires; and

(2) pay the fee for the license as set forth in this article.

TITLE 2. AMUSEMENTS

SUBTITLE 1. LICENSES-GENERAL PROVISIONS

Sec. 2-101. License required.

A person may not operate or permit the operation of a carnival, coin-operated amusement device, game, or event for which a license is required by this title without having obtained the license.
(Code 1967 Section 12-200, 12-211)

Sec. 2-102. Exemptions from license fee.

A license fee for concessions may not be charged to any qualified applicant for a license to operate a carnival, circus, show, amusement ride, or amusement device on behalf of a volunteer fire company, war veterans' organization, or a bona fide patriotic, educational, fraternal, religious, charitable, benevolent, or civic organization or corporation if the applicant:

(1) has been granted a tax-exempt status by the United State Internal Revenue Service on the basis of a charitable or nonprofit exemption;

(2) was organized or incorporated at least one year before the date of the application;

(3) has a resident agent who has resided in the County at least one year before the date of the application: and

(4) has filed a certified copy of its charter with the Clerk of the Circuit Court at least one year before the date of the application.

(Code 1967, Section 12-208)

Sec. 2-103. Inspections.

The Police Department shall make frequent inspections of premises for which licenses are issued under this title to ascertain that the premises and the devices in the premises are licensed. (Code 1967, Section 12-209)

Sec. 2-104. License-Application, issuance.

An application for a license required by this title shall be signed and sworn to by the applicant on the form required by the Department. The Department is not required to make an investigation before the issuance of a license and may refuse to issue the license on the basis of the facts disclosed by the application. If on investigation by the Department it is found that the person requesting the issuance of a license required by this title has been a false statement in the application or that the operation of the devices at the proposed premises will create a nuisance or will be detrimental to the peace and welfare of the community, the Department may deny or revoke the license. (Code 1967, Section 12-201)

Sec. 2-105. Same-Fee.

A license may not be issued until the fee established by this title is paid to the Department.
(Code 1967, Section 12-202)

Sec. 2-106. Same-Term; proration of fee.

Licenses issued under this title shall be issued for the year beginning July 1 of each year and ending June 30 of the next succeeding year unless otherwise provided. For a license issued after the beginning of the license year, the license fee shall be reduced by an amount equal to one-twelfth of the annual fee for each full calendar month since the beginning of the license year. If a license is voluntarily surrendered before the expiration of the license the Department shall refund to the licensee an amount equal to one-twelfth of the annual fee for each full calendar month remaining in the license year.
(Code 1967, Section 12-207)

Sec. 2-107. Same-Issuance of license in quadruplicate; disposition of copies.

Licenses issued under this title shall be prepared in quadruplicate on forms required by the Department. One copy shall be retained by the Department, one copy shall be forwarded to the State Comptroller, one copy shall be forwarded to the Police Department, and one copy shall be delivered to the licensee.
(Code 1967, Section 12-203)

Sec. 2-108. Prizes and awards.

The Department may permit the issuance of a prize or award in the operation of a carnival, circus, show, amusement ride, or amusement device licensed under authority of this title as an award or prize for skill or score attained.
(Code 1967, Section 12-210)

Sec. 2-109. Death of individual licensee.

(a) (1) On the death of the holder of a license issued under this title and on application made by the personal representative of the estate of the deceased licensee, the Department may issue to the personal representative a certificate of permission to continue to operate the devices licensed to the deceased licensee until the expiration of the license.

(2) A fee of $25 shall be paid to the County for the issuance of a certificate and the certificate shall be applicable to all of the licenses issued to a deceased licensee.

(b) (1) The personal representative to whom a certificate of permission has been granted may assign or transfer the license for the benefit of the estate with the approval of the Department.

(2) On approval of the application for the transfer or assignment of the license and on payment to the County of a fee of $100 a certificate of transfer shall be issued by the Department to the transferee or assignee. The certificate shall entitle the transferee or assignee to continue to operate the amusement devices licensed until expiration of the license.

(c) Certificates of permission or transfer shall state the

name, the address of the deceased licensee, the number and class of licenses issued to the deceased licensee, the time of the licensee's death, the name and address of the person to whom the certificate has been issued, and the termination date of the certificate. Copies of the certificates shall be furnished to the licensee, the State Comptroller, and the County Police Department.

(Code 1967, Sections 12-212-12-214)

Sec. 2-110. Death of licensee under group license.

(a) If a license required by this title was issued in the name of more than one person, the license does not become inoperative because of the death of less than all of the persons to whom the license was issued.

(b) If all of the persons in whose names and license required by this title was issued die during the term of the license, the personal representatives of the deceased persons are entitled to obtain certificates under Section 2-109 of this subtitle. (Code 1967, Section 12-215, 12-216)

COUNTY COUNCIL OF ANNE ARUNDEL COUNTY, MARYLAND

legislative Session 1991, Legislative Day No. 41

Bill No. 98-91

introduced by Mrs. Clagett, Chairman
(by request of the County Executive)

By the County Council, November 4-1991

Introduced and first read on November 4, 1991 Public Hearing set for and held on November 18, 1991

By Order: Judy C. Holmes,
Administrative Officer

A BILL ENTITLED

AN EMERGENCY ORDINANCE concerning: Adult Bookstores, Adult Film Arcades, and Adult Motion Picture Theaters.

FOR the purpose of establishing requirements for the licensing and regulation of adult film arcades: establishing criteria for zoning restrictions on the location and operation of adult bookstores and adult motion picture theaters, including adult

film arcades; and providing for expedited decisions and administrative appeals from decisions relating to adult bookstores, adult film arcades, and adult motion picture theaters.

BY repealing: Article 16 Section 2-1101 through 2-1110
Anne Arundel County Code (1985, as amended)

BY adding: Article 3, Section 3-101; 3-102, and 3-103; Article 16 Section 2-1101 through 2-1113 to be under the new title. "Title 3. Appeals Relating to Adult Film Arcades and Adult Motion Picture Theaters"; and Article 28. Section 1-128; 3-403 (b) (10); 4-404(d); and 14-106(a)(9)
Anne Arundel County Code (1985, as amended)

BY repealing and reenacting, with amendments: Article 28. Section 3-103 (a) (8) and (22); 3-204(a)(2)(viii); 3-303(a)(15) and (56); 3-403(a)(55); and 14-106(a)(7) and (8)
Anne Arundel County Code (1985, as amended)

BY renumbering: Article 28 Section 1-101(1), (1A) and (1B) to be (1C), (1D), and (1E), respectively
Anne Arundel County Code (1985, as amended)

WHEREAS, the County Council has determined through testimony and other evidence presented to it that sexually oriented businesses, sometimes referred to as "adult entertainment", have a harmful effect on the area in that they are located and contribute to neighborhood blight; and

WHEREAS, the County Council believes that these secondary effects of sexually oriented businesses, including adult bookstores, adult film arcades, and adult motion picture theaters, required regulation in order to protect the citizen of the County and their neighborhoods from nuisance and deterioration; and

WHEREAS, the County Council further believes that the on-premises display of adult motion pictures in adult film arcades, commonly known as peep shows, is particularly likely to promote illicit sexual conduct in commercial establishments, and requires licensure in addition to the zoning and land use restrictions generally applicable to adult bookstores and adult motion picture theaters; now, therefore,

SECTION 1. Be it enacted by the County Council of Anne Arundel County, Maryland, That Article 16 Sections 2-+1101 through 2-1110 of the Anne Arundel County Code (1985, amended) are hereby repealed.

SECTION 2. And be it further enacted, That Article 28, Section 1-101(1), (1A), and (1B) of the Anne Arundel County Code (1985, as amended) are hereby renumbered to be (1C), (1D), and (1E), respectively.

SECTION 3. And be it further enacted, That Section(s) of the Anne Arundel County Code (1985, as amended) read as follows:

ARTICLE 3 COUNTY BOARD OF APPEALS

Title 3. Appeals Relating to Adult Film Arcades and Adult Motion Picture Theaters

3-3101. Definitions.

(A) IN THIS TITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) "ADULT BOOKSTORE" HAS THE MEANING STATED IN ARTICLE 28, Section 1-101(1) OF THIS CODE.

(C) "ADULT FILM ARCADE" HAS THE MEANING STATED IN ARTICLE 16, Section 2-1101 OF THIS CODE.

(D) "ADULT MOTION PICTURE THEATER" HAS THE MEANING STATED IN ARTICLE 28, Section 1-101(1B) OF THIS CODE.

3-102. Scope.

(A) THE PROVISIONS OF THIS TITLE APPLY TO THE FOLLOWING DECISIONS OF THE DIRECTOR OF INSPECTIONS AND PERMITS:

(1) APPROVAL OR DENIAL OF A CLASS Y ADULT FILM ARCADE LICENSE:

(2) REVOCATION OF A CLASS Y ADULT FILM ARCADE LICENSE; AND

(3) APPROVAL OR DENIAL OF THE RENEWAL OF A CLASS Y ADULT FILM ARCADE LICENSE.

(B) THE PROVISIONS OF THIS TITLE APPLY TO THE FOLLOWING DECISIONS OF THE PLANNING AND ZONING OFFICER:

(1) APPROVAL OR DENIAL OF A ZONING CERTIFICATE OF USE FOR AN ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER: AND

(2) REVOCATION OF A ZONING CERTIFICATE OF USE FOR AN ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER.

3-103. Procedures

WITHIN 60 DAYS AFTER THE FILING OF AN APPEAL FROM A DECISION WITHIN THE SCOPE OF THIS TITLE, THE COUNTY BOARD OF APPEALS SHALL HEAR AND DECIDE THE APPEAL, UNLESS THE RIGHT TO A HEARING WITHIN 60 DAYS IS WAIVED IN WRITING BY ALL PARTIES TO THE DECISION. IF THE COUNTY BOARD OF APPEALS FAILS TO MAKE A DECISION WITHIN 60 DAYS, THE DECISION OF THE DIRECTOR OF INSPECTIONS AND PERMITS OR THE PLANNING AND ZONING OFFICER SHALL BE CONSIDERED AFFIRMED. AND THE PARTY APPEALING THE DECISION HAS THE IMMEDIATE RIGHT OF APPEAL TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IN ACCORDANCE WITH SECTION 604 OF THE CHARTER.

ARTICLE 16 LICENSES AND PERMITS
Title 2. Amusements
Subtitle 11. Adult Film Arcades (Class Y)

2-1101. Definitions.

(A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) (1) "ADULT FILM ARCADE" MEANS ANY PLACE IN WHICH ONE OR MORE DISPLAY DEVICES ARE MAINTAINED TO SHOW IMAGES FOR COMMERCIAL ENTERTAINMENT OR AMUSEMENT PURPOSES. AND WHERE THE IMAGES ARE CHARACTERIZED BY THE DEPICTION OR DESCRIPTION OF SADOMASOCHISTIC ABUSE, SEXUAL CONDUCT, OR SEXUAL EXCITEMENT, AS THOSE TERMS ARE DEFINED IN ARTICLE 27, SECTION 416a OF THE STATE CODE.

(2) "ADULT FILM ARCADE" DOES NOT INCLUDE A MOTION PICTURE THEATER THAT HAS SEATING FOR AT LEAST 50 PERSONS PER SCREEN.

(C) "DISPLAY DEVICE" MEANS A COIN-OPERATED OR TOKEN-OPERATED OR ELECTRONICALLY, ELECTRICALLY, OR MECHANICALLY CONTROLLED STILL OR MOTION PICTURE MACHINE, FILM PROJECTOR, VIDEOTAPE PLAYER, OR OTHER IMAGE-PRODUCING DEVICE THAT MAY BE ACTIVATED DIRECTLY OR INDIRECTLY BY INDIVIDUAL VIEWERS OR AT THE REQUEST OF INDIVIDUAL VIEWERS.

(D) "VIEWING BOOTH" MEANS A PARTIALLY ENCLOSED SPACE OR OTHER AREA WITHIN AN ADULT

FILM ARCADE IN WHICH A DISPLAY DEVICE IS LOCATED FOR PURPOSES OF VIEWING PICTURES, FILMS, VIDEOTAPES, OR OTHER IMAGES.

2-1102. License required.

A CLASS Y LICENSE IS REQUIRED TO PLACE, OPERATE, OR MAINTAIN AN ADULT FILM ARCADE.

2-1103. Application.

(A) THE OWNER OF THE BUSINESS THAT INCLUDES THE ADULT FILM ARCADE SHALL APPLY FOR A CLASS Y LICENSE BY FILING WITH THE DEPARTMENT AN APPLICATION IN THE FORM PRESCRIBED BY THE DEPARTMENT. THE APPLICATION SHALL INCLUDE:

(1) THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE APPLICANT:

(2) IF THE APPLICANT IS A CORPORATION, THE NAME AND ADDRESS OF THE RESIDENT AGENT AND EACH DIRECTOR AND OFFICER OF THE CORPORATION:

(3) IF THE APPLICANT IS A PARTNERSHIP, THE NAME AND ADDRESS OF EACH PARTNER:

(4) THE NAME AND ADDRESS OF THE INDIVIDUAL WHOM THE APPLICANT HAS DESIGNATED TO RECEIVE ALL NOTICES AS REQUIRED BY SECTION 2-1111 OF THIS SUBTITLE:

(5) THE ADDRESS OF THE PREMISES WHERE THE

ADULT FILM ARCADE WILL BE LOCATED, WITH A DIAGRAM OF THE INTERIOR OF THE ADULT FILM ARCADE THAT DEPICTS THE LOCATION OF THE DISPLAY DEVICES, THE VIEWING BOOTHS, AND THE MANAGER'S STATIONS:

(6) A DESCRIPTION OF THE NUMBER AND TYPE OF DISPLAY DEVICES TO BE USED IN THE OPERATION OF THE ADULT FILM ARCADE.

(7) A COPY OF THE ZONING CERTIFICATE OF USE FOR AN ADULT MOTION PICTURE THEATER FOR THE PREMISES DESCRIBED ON THE APPLICATION: AND

(8) PROOF OF THAT THE APPLICANT HAS PAID ANY TAXES DUE AND PAYABLE TO THE COUNTY FOR PRIOR YEARS ON PERSONAL PROPERTY USED IN THE BUSINESS AND HAS PAID TO THE STATE ANY COUNTY ADMISSIONS AND AMUSEMENT TAX FROM THE BUSINESS DUE AND PAYABLE FOR PRIOR YEARS.

(8) PROOF THAT THE APPLICANT HAS NO ZONING CITATIONS OR VIOLATIONS PENDING AGAINST THE BUSINESS AND HAS PAID:

(I) ANY TAXES DUE AND PAYABLE TO THE STATE AND COUNTY FOR PRIOR YEARS ON REAL AND PERSONAL PROPERTY USED IN THE BUSINESS.

(II) ANY ADMISSIONS AND AMUSEMENT TAX DUE AND PAYABLE TO THE STATE FROM PRIOR YEARS: AND

(III) ANY FEES, FINES, OR PENALTIES DUE AND PAYABLE UNDER THIS ARTICLE FROM THE CURRENT

YEAR OR PRIOR YEARS.

(B) THE APPLICATION IS CONTINUING IN NATURE AND THE APPLICANT OR LICENSEE SHALL FURNISH THE DEPARTMENT WITH ANY CHANGES IN THE INFORMATION PROVIDED ON THE APPLICATION FORM AS THE CHANGES OCCUR.

2-1104. Fee

THE ANNUAL FEE FOR A CLASS Y LICENSE IS $2,500, OR $300 FOR EACH DISPLAY DEVICE OR VIEWING BOOTH, WHICHEVER IS GREATER.

2-1105. Issuance.

(A) THE DIRECTOR SHALL ISSUE A CLASS Y LICENSE IF THE APPLICANT MEETS THE REQUIREMENTS OF THIS SUBTITLE.

(B) THE DIRECTOR MAY NOT ISSUE A CLASS Y LICENSE UNTIL THE APPLICANT HAS BEEN ISSUED A ZONING CERTIFICATE OF USE FOR AN ADULT MOTION PICTURE THEATER FOR THE PREMISES DESCRIBED ON THE APPLICATION.

(C) THE DIRECTOR SHALL APPROVE OR DENY THE ISSUANCE OF A CLASS Y LICENSE WITHIN 30 DAYS OF RECEIPT OF A COMPLETED APPLICATION BY THE DEPARTMENT. A WRITTEN NOTICE TO APPROVAL OR DENIAL SHALL BE SENT TO THE APPLICANT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND SHALL BE MAILED WITHIN FIVE DAYS AFTER THE

DATE THAT THE DECISION IS RENDERED. A NOTICE OF DENIAL SHALL SPECIFY THE REASONS THAT THE LICENSE HAS DENIED. FAILURE BY THE DIRECTOR TO ISSUE A LICENSE WITHIN 30 DAYS OF APPLICATION SHALL BE CONSIDERED A DENIAL, AND THE APPLICANT HAS THE IMMEDIATE RIGHT OF APPEAL TO THE COUNTY BOARD OF APPEALS.

2-1106. Term.

A CLASS Y LICENSE SHALL BE ISSUED FOR THE CALENDAR YEAR.

2-1107. Requirements.

(A) THE ADULT FILM ARCADE SHALL CONTAIN AT LEAST ONE MANAGER'S STATION NOT EXCEEDING 32 SQUARE FEET OF FLOOR SPACE, AND THE LOCATION AND CONFIGURATION OF THE MANAGER'S STATION MAY NOT BE ALTERED FROM THAT APPROVED ON THE APPLICATION WITHOUT THE CONSENT OF THE DIRECTOR.

(B) AT LEAST ONE EMPLOYEE OF THE ADULT FILM ARCADE SHALL BE ON DUTY AT EACH MANAGER'S STATION WHEN A CUSTOMER IS USING A DISPLAY DEVICE.

(C) THE INTERIOR OF THE ADULT FILM ARCADE SHALL BE ARRANGED IN SUCH A MANNER THAT EACH AREA OF THE ADULT FILM ARCADE OPEN TO CUSTOMERS, INCLUDING ANY VIEWING BOOTH OR OTHER AREA IN WHICH A DISPLAY DEVICE IS LOCATED, IS VISIBLE FROM AT LEAST ONE MANAGER'S

STATION.

(D) THE ADULT FILM ARCADE SHALL BE EQUIPPED WITH OVERHEAD LIGHTING OF SUFFICIENT INTENSITY TO LIGHT EACH AREA OF THE ADULT FILM ARCADE OPEN TO CUSTOMERS AT AN ILLUMINATION OF AT LEAST ONE FOOTCANDLE, MEASURED AT FLOOR LEVEL, AND THIS LIGHTING SHALL BE ON WHENEVER A CUSTOMER IS PRESENT IN THE ADULT FILM ARCADE.

(E) A VIEWING BOOTH OR OTHER AREA IN WHICH A DISPLAY DEVICE IS LOCATED MAY NOT BE EQUIPPED WITH A CURTAIN, DOOR, OR ANY OTHER DEVICE THAT ALLOWS THE BOOTH'S INTERIOR TO BE SCREENED FROM THE MANAGER'S STATION.

(F) EACH VIEWING BOOTH OR OTHER AREA IN WHICH A DISPLAY DEVICE IS LOCATED SHALL BE SEPARATED FROM OTHER VIEWING BOOTHS BY A WALL OR OTHER SOLID PARTITION.

(G) AN ADULT FILM ARCADE SHALL CONTAIN NO MORE THAN 10 DISPLAY DEVICES OR VIEWING BOOTHS AND NO MORE THAN FIVE PERSONS ARE ALLOWED IN VIEWING BOOTH AT ANY ONE TIME.

(H) A SIGN READABLE BY THE VIEWER AND CONTAINING THE FOLLOWING LANGUAGE SHALL BE POSTED AT EACH DISPLAY DEVICE:

"SEXUAL CONDUCT, INCLUDING HUMAN MASTURBATION, SEXUAL INTERCOURSE OR ANY TOUCH OR CONTACT WITH THE GENITALS, PUBIC AREAS, OR BUTTOCKS OF THE HUMAN MALE OR

FEMALE, OR THE BREASTS OF THE FEMALE WHETHER ALONE OR BETWEEN MEMBERS OF THE SAME OR OPPOSITE SEX IS PROHIBITED IN AN ADULT FILM ARCADE AND CONSTITUTES A MISDEMEANOR PUNISHABLE BY A FINE NOT EXCEEDING $1,000 OR IMPRISONMENT NOT EXCEEDING SIX MONTHS OR BOTH."

(I) THE CLASS Y LICENSE SHALL BE PROMINENTLY DISPLAYED AT THE MANAGER'S BOOTH.

2-1108. License renewal.

(A) NO LATER THAN 60 DAYS PRIOR TO THE EXPIRATION OF A LICENSE TERM, A LICENSEE MAY APPLY FOR RENEWAL OF A CLASS Y LICENSE. THE APPLICATION FOR RENEWAL SHALL BE ON THE FORM PRESCRIBED BY THE DEPARTMENT AND SHALL INCLUDE THE INFORMATION REQUIRED FOR AN INITIAL LICENSE APPLICANT UNDER SECTION 2-1103 OF THIS SUBTITLE.

(B) THE DIRECTOR SHALL DENY RENEWAL OF A LICENSE FOR THE SAME REASONS CONSTITUTING GROUNDS REVOCATION UNDER SECTION 2-1110(A) OF THIS SUBTITLE.

BEFORE RENEWAL OF A LICENSE MAY BE DENIED, THE DIRECTOR SHALL COMPLY WITH THE PROCEDURAL REQUIREMENTS OF SECTION 1110(B) OF THIS SUBTITLE.

(C) IF THE DIRECTOR DOES NOT ISSUE A DECISION ON THE RENEWAL OF A LICENSE PRIOR TO THE EXPIRATION OF THE LICENSE TERM, THE LICENSEE

MAY OPERATE UNDER THE EXPIRED LICENSE UNTIL THE DECISION IS ISSUED.

2-1109. Prohibited acts; penalties.

(A) A PERSON MAY NOT OWN OR OPERATE A BUSINESS OR OTHER ESTABLISHMENT THAT INCLUDES AN ADULT FILM ARCADE WITHOUT A CLASS Y LICENSE.

(B) AN APPLICANT MAY NOT FALSIFY INFORMATION ON THE APPLICATION FOR ISSUANCE OR RENEWAL OF A CLASS Y LICENSE.

(C) A LICENSEE MAY NOT PERMIT AN ADULT FILM ARCADE TO BE USED FOR THE DISPLAY OF OBSCENE MATTER AS THAT TERM IS APPLIED UNDER ARTICLE 27, SECTION 418 OF THE STATE CODE.

(D) A PERSON MAY NOT ENGAGE IN SEXUAL CONDUCT, AS THAT TERM IS DEFINED IN ARTICLE 27, SECTION 416A OF THE STATE CODE, ON THE PREMISES OF AN ADULT FILM ARCADE INCLUDING THE PARKING LOT.

(E) A PERSON MAY NOT POSSESS OR USE AN ALCOHOLIC BEVERAGE ON THE PREMISES OF AN ADULT FILM ARCADE INCLUDING THE PARKING LOT.

(F) A PERSON WHO VIOLATES ANY PROVISION OF THIS SUBTITLE IS GUILTY OF A MISDEMEANOR AND ON CONVICTION IS SUBJECT TO A FINE NOT EXCEEDING $1,000 OR IMPRISONMENT NOT EXCEEDING SIX MONTHS OR BOTH.

2-1110. Revocation or nonrenewal.

(A) THE DIRECTOR MAY REVOKE OR DENY RENEWAL OF CLASS Y LICENSE ONLY FOR A VIOLATION OF THE PROVISIONS OF THIS SUBTITLE OR FOR A VIOLATION OF OTHER FEDERAL, STATE, OR COUNTY LAW BY THE LICENSEE ARISING DIRECTLY FROM THE OPERATION OF THE ADULT FILM ARCADE.

(B) BEFORE A CLASS Y LICENSE MAY BE REVOKED FOR RENEWAL DENIED, THE DIRECTOR SHALL CONDUCT A HEARING TO DETERMINE IF A FACTUAL BASIS EXISTS FOR THE REVOCATION OR NONRENEWAL OF THE LICENSE UNDER THE FOLLOWING PROCEDURES.

(1) THE DIRECTOR SHALL NOTIFY THE LICENSEE OF THE DATE, TIME, AND PLACE OF THE HEARING AND THE ALLEGATIONS THAT ARE THE GROUNDS FOR THE REVOCATION OR NONRENEWAL;

(2) THE NOTICE SHALL BE SENT TO THE LICENSEE UNDER THE PROVISIONS OF SECTION 2-111 OF THIS SUBTITLE.

(3) THE HEARING MAY NOT BE SCHEDULED LESS THAN 15 DAYS OR MORE THAN 45 DAYS AFTER THE DATE OF SERVICE OF THE NOTICE; AND

(4) THE ALLEGATIONS MUST BE PROVED BY A PREPONDERANCE OF THE EVIDENCE.

(C) WITHIN 30 DAYS AFTER THE HEARING, THE DIRECTOR SHALL ISSUE A WRITTEN DECISION

REGARDING THE REVOCATION OR NONRENEWAL OF THE LICENSE THAT SHALL INCLUDE FINDINGS OF FACT AS TO EACH ALLEGATION. THE DIRECTOR SHALL PROVIDE THE LICENSEE WITH A COPY OF THE WRITTEN DECISION AND FINDINGS OF FACT. A DECISION BY THE DIRECTOR REVOKING OR DENYING RENEWAL OF A LICENSE MAY BE APPEALED BY THE LICENSEE TO THE COUNTY BOARD OF APPEALS. FAILURE BY THE DIRECTOR TO ISSUE A WRITTEN DECISION WITHIN 30 DAYS AFTER THE HEARING SHALL BE CONSIDERED A DENIAL OF THE REVOCATION OR AS AN APPROVAL OF THE RENEWAL.

2-111. Notices.

(A) A LICENSEE SHALL NAME IN ITS APPLICATION AN INDIVIDUAL WHO RESIDES IN ANNE ARUNDEL COUNTY AND WHO IS AVAILABLE DURING NORMAL BUSINESS HOURS TO RECEIVE ALL NOTICES REQUIRED UNDER THIS ARTICLE. THE NAME OF THE INDIVIDUAL MAY NOT BE CHANGED WITHOUT THE WRITTEN CONSENT OF THE DIRECTOR.

(B) NOTICES REQUIRED BY THIS ARTICLE SHALL BE SENT TO THE INDIVIDUAL DESIGNATED IN SUBSECTION (A) OF THIS SECTION BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND SHALL BE PRESUMED SERVED UPON THE DATE OF MAILING. A COPY OF ANY NOTICE ALSO SHALL BE SENT BY FIRST CLASS MAIL, POSTAGE PREPAID, TO THE LICENSEE AT THE ADDRESS AT WHICH THE ADULT FILM ARCADE IS LOCATED.

(C) IF THE CERTIFIED MAIL IS RETURNED

WITHOUT DELIVERY, NOTICE SHALL BE COMPLETED BY POSTING THE NOTICE ON THE PREMISES.

2-1112. Inspections.

AT ALL TIMES WHEN THE ADULT FILM ARCADE IS OPEN TO THE PUBLIC FOR BUSINESS, THE DIRECTOR, THE DIRECTOR'S DESIGNEE, OR ANY SWORN OFFICER OF THE ANNE ARUNDEL COUNTY POLICE DEPARTMENT HAS THE RIGHT:

(1) TO INSPECT WITHOUT PRIOR NOTICE ALL PARTS OF THE PREMISES OPEN TO THE PUBLIC, INCLUDING VIEWING BOOTHS, TO INSURE COMPLIANCE WITH THIS SUBTITLE; AND

(2) TO ENTER THE MANAGER'S BOOTH TO OBSERVE THE ACTIVITIES IN THE VIEWING BOOTH AND THE DISPLAY DEVICES.

2-1113. Injunctive and other relief.

(A) THE COUNTY MAY SEEK INJUNCTIVE RELIEF TO PROHIBIT AN ADULT FILM ARCADE FROM BEING PLACED OR MAINTAINED IN USE OR OPERATION WITHOUT A VALID CLASS Y LICENSE.

(B) THE REMEDIES AVAILABLE TO THE COUNTY FOR ANY VIOLATION OF THIS SUBTITLE SHALL BE CONSTRUED AS CUMULATIVE AN NOT EXCLUSIVE, AND THE COUNTY MAY SEEK INJUNCTIVE RELIEF TO PREVENT A VIOLATION OF THIS SUBTITLE OR TO ENFORCE ANY LICENSE REQUIREMENT OR PROHIBITION.

ARTICLE 28 ZONING
Title 1. General Provisions

1-101. Definitions-Generally.

In this article the following words have the meanings indicated:

(1) "ADULT BOOKSTORE" MEANS A COMMERCIAL ESTABLISHMENT THAT, AS ONE OF ITS PRINCIPAL BUSINESS PURPOSES, SELLS OR RENTS:

(I) BOOKS, MAGAZINES, PERIODICALS, OR OTHER PRINTED MATTER: OR PHOTOGRAPHS, FILMS, MOTION PICTURES, VIDEOTAPES, SLIDES, OR OTHER VISUAL REPRESENTATIONS THAT DEPICT OR DESCRIBE SADOMASOCHISTIC ABUSE, SEXUAL CONDUCT, OR SEXUAL EXCITEMENT, AS THOSE TERMS ARE DEFINED IN ARTICLE 27, SECTION 416A OF THE STATE CODE; OR

(II) INSTRUMENTS, DEVICES, OR PARAPHERNALIA DESIGNED FOR USE IN CONNECTION WITH SEXUAL CONDUCT.

(1A) "ADULT FILM ARCADE" HAS THE MEANING DESCRIBED IN ARTICLE 16, SECTION 2-1101 OF THIS CODE.

(1B) (I) "ADULT MOTION PICTURE THEATER" MEANS ANY PLACE WHERE MOTION PICTURES, FILMS, VIDEOTAPES, SLIDES, OR SIMILAR PHOTOGRAPHIC REPRODUCTIONS ARE REGULARLY SHOWN ON THE PREMISES FOR COMMERCIAL ENTERTAINMENT OR AMUSEMENT PURPOSES THAT ARE CHARACTERIZED BY

THE DEPICTION OR DESCRIPTION OF SADOMASOCHISTIC ABUSE, SEXUAL CONDUCT, OR SEXUAL EXCITEMENT, AS THOSE TERMS ARE DEFINED IN ARTICLE 27, SECTION 416A OF THE STATE CODE.

(II) "ADULT MOTION PICTURE THEATER" INCLUDES AN ADULT FILM ARCADE.

1-128. Zoning certificate of use.

(E) (1) NO PREMISES OR STRUCTURE MAY BE USED FOR ANY PURPOSE THAT FEATURES OR INCLUDES AN ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER WITHOUT A ZONING CERTIFICATE OF USE FOR THAT PURPOSE. THE ZONING CERTIFICATE OF USE SHALL SPECIFY WHETHER IT IS FOR AN ADULT BOOKSTORE OR AN ADULT MOTION PICTURE THEATER AND IF IT IS FOR AN ADULT MOTION PICTURE THEATER, WHETHER THE ADULT MOTION PICTURE THEATER IS AN ADULT FILM ARCADE.

(2) AN APPLICATION FOR A ZONING CERTIFICATE OF USE FOR AN ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER SHALL BE ON A FORM PRESCRIBED BY THE OFFICE OF PLANNING AND ZONING, WITH THE FORM, ANNOTATED TO INDICATE THAT THE APPLICATION REQUIRES EXPEDITED DISPOSITION. THE APPLICATION SHALL SPECIFY WHETHER IT IS FOR AN ADULT BOOKSTORE OR AN ADULT MOTION PICTURE THEATER, AND, IF IT IS FOR AN ADULT MOTION PICTURE THEATER, WHETHER THE ADULT MOTION PICTURE THEATER IS AN ADULT FILM ARCADE.

(3) THE ISSUANCE OF A ZONING CERTIFICATE OF USE

FOR AN ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER SHALL BE APPROVED OR DENIED WITHIN 30 DAYS OF THE RECEIPT OF THE COMPLETED APPLICATION BY THE OFFICE OF PLANNING AND ZONING.

(4) A WRITTEN NOTICE OF APPROVAL OR DENIAL SHALL BE SENT TO THE APPLICANT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, A NOTICE OF DENIAL SHALL SPECIFY THE REASONS THAT THE ZONING CERTIFICATE OF USE WAS DENIED.

(5) FAILURE BY THE OFFICE OF PLANNING AND ZONING TO ISSUE A ZONING CERTIFICATE OF USE WITHIN 30 DAYS OF APPLICATION SHALL BE CONSIDERED A DENIAL AND THE APPLICANT HAS THE IMMEDIATE RIGHT OF APPEAL TO THE COUNTY BOARD OF APPEALS.

(5) JUDICIAL ACTION MAY NOT BE INITIATED BY THE COUNTY TO ENFORCE THE REVOCATION OF A ZONING CERTIFICATE OF USE OF AN ADULT BOOKSTORE OR ADULT NOTION PICTURE THEATER UNTIL THE OWNER OR OPERATOR OF THE ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER HAS HAD THE OPPORTUNITY TO BE HEARD ON THE REVOCATION BEFORE THE COUNTY BOARD OF APPEALS.

Title 3. Commercial Districts

3-103. Permitted uses; conditional uses.

(a) The following uses and the accessory structures or uses customarily incidental to them are permitted as permitted

uses in a C1-Local Retail District:

(8) bookstores, EXCEPT ADULT BOOKSTORES:

(22) indoor theaters, EXCEPT ADULT MOTION PICTURE THEATERS.

3-204. Permitted uses; conditional uses.

(a) The following uses and accessory structures or uses customarily incidental to them ar permitted as permitted uses in a C2-Commercial Office District:

(2) auxiliary retail service uses, provided that the following uses may be undertaken only when a part of a principal structure and only when the total of the uses does not exceed 25% of the floor area of the principal structure:

(i) barbershops;

(ii) business machine sales and rentals;

(iii) drug and surgical stores;

(iv) package goods stores;

(v) restaurants, taverns, lounges, dance halls, banquet halls, and nightclubs;

(vi) telegraph offices;

(vii) spas and health centers; and

(viii) indoor theaters, EXCEPT ADULT MOTION PICTURE

THEATERS, and cultural centers:

3-303. Permitted uses; conditional uses.

(a) The following uses including accessory structures or uses customarily incidental to them are permitted as permitted uses in a C3-General Commercial District:

(15) book stores, EXCEPT ADULT BOOK STORES

(56) indoor theaters, EXCEPT ADULT MOTION PICTURE THEATERS;

3-403. Permitted uses; conditional uses.

(a) The following uses including accessory structures or uses customarily incidental to them are permitted uses in a C4-Highway Commercial District;

(55) motion picture theaters, except drive-ins AND ADULT MOTION PICTURE THEATERS;

(b) The following uses are permitted as conditional uses in a C4-Highway Commercial District;

(9) subject to the conditions of Section 3-103(b)(6) of this title, retial sale of liquefied petroleum gases; AND

(10) (I) ADULT BOOKSTORES AND ADULT MOTION PICTURE THEATERS, IF:

1. LOCATED AT LEAST 1,000 FEET FROM THE BOUNDARY LINE OF ANY RESIDENTIAL DISTRICT; ANY

DWELLING, SCHOOL, LIBRARY, PARK, PLAYGROUND, CHILD CARE CENTER, OR CHURCH OR OTHER PLACE OF WORSHIP; OR ANY OTHER ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER;

2. ALL WINDOWS, DOORS, AND OTHER APERATURES ARE BLACKENED OR OBSTRUCTED TO PREVENT ANYONE OUTSIDE THE ESTABLISHMENT FROM VIEWING ITS INTERIOR;

3. THE PROPRIETOR, OWNER, AND EMPLOYEES OF THE ESTABLISHMENT PROHIBIT ACCESS TO THE PREMISES BY ANYONE UNDER 18 YEARS OLD;

4. THE ADULT MOTION PICTURE THEATER IS NOT USED FOR THE DISPLAY OF OBSCENE FILMS OR OTHER PERFORMANCES; AND

5. FOR AN ADULT MOTION PICTURE THEATER, OFF-STREET PARKING IS PROVIDED IN ACCORDANCE WITH THE STANDARDS FOR A THEATER UNDER TITLE 7 OF THIS ARTICLE, AND

(II) FOR THE PURPOSES OF THIS PARAGRAPH, DISTANCE SHALL BE MEASURED IN A STRAIGHT LINE, WITHOUT REGARD TO INTERVENING OBJECTS, FROM THE CLOSEST PART OF THE LOT ON WHICH THE ADULT BOOKSTORE OR ADULT MOTION PICTURE THEATER IS LOCATED TO THE NEAREST BOUNDARY LINE OF ANY RESIDENTIAL DISTRICT OR THE NEAREST PROPERTY LINE OF THE LOT ON WHICH THE DWELLING, SCHOOL, LIBRARY, PARK, PLAYGROUND, CHILD CARE CENTER, OR CHURCH OR OTHER PLACE OF WORSHIP, OR OTHER ADULT BOOKSTORE OR ADULT MOTION PICTURE

THEATER IS LOCATED.

Title 4. Industrial Districts.

4-404. Permitted uses; conditional uses.

(D) ADULT BOOKSTORES AND ADULT MOTION PICTURE THEATERS ARE PERMITTED AS A CONDITIONAL USE IN A W3 HEAVY INDUSTRIAL DISTRICT SUBJECT TO THE CONDITIONS OF SECTION 3-403(B)(10) OF THIS ARTICLE.

ARTICLE 28 ZONING
Title 14. Nonconforming Uses

14-106. Discontinuance of certain nonconforming uses.

(a) The following nonconforming uses shall be discontinued within the period of time indicated after notice by the Office of Planning and Zoning;

(7) other nonconforming signs:

(i) with an original cost of $500 or less, one year;

(ii) with an original cost of $500.01 through $1,000, 18 months;

(iii) with an original cost of $1,000.01 through $2,000, two years;

(iv) with an original cost of $2,000.01 through $3,000, 30 months;

(v) with an original cost of $3,000.01 through $4,000, three years;

(vi) with an original cost of $4,000.01 through $5,000, 42 months; and

(vii) with an original cost of $5,000, 42 months plus one additional year for each $2,000 or fraction of $2,000 in original cost over $5,000, to a maximum of six years; [and]

(8) watercraft exceeding 150 feet in length or 35 feet in width moored or docked at a marine or private pier other than as permitted in Section 5-119(3) or Section 10-111(d) of this article, one year; AND

(9) adult bookstores and adult motion picture theaters, one year.

SECTION 4. And be further enacted. That this Ordinance is hereby declared to be an emergency ordinance and necessary for the immediate preservation of the public peace, health, safety, welfare, and property, and being passed by the affirmative vote of five members of the County Council, the same shall take effect from the date it comes law.

AMENDMENTS ADOPTED November 18, 1991

READ AND PASSED this 18th day of November, 1991

By Order:

Judy C. Holmes
Administrative Officer

PRESENTED to the County Executive for his approval this 19th day of November 1991

Judy C. Holmes
Administrative Officer

APPROVED AND ENACTED THIS _____ day of , 1994

Robert R. Neall
County Executive

ANNE ARUNDEL COUNTY, MARYLAND	*	
		IN THE
A Body Corporate and Politic Arundel Center	*	
44 Calvert Street		
Annapolis, Maryland 21401	*	CIRCUIT COURT
Plaintiff	*	
V.	*	
		FOR
ANNAPOLIS ROAD, LTD.	*	
A Delaware Corporation		
registered to do business at	*	ANNE ARUNDEL
COUNTY		
1656 Annapolis Road		
Odenton, Maryland 21113	*	
Defendant	*	CASE NO.
Serve on: Stuart R. Rombro,	*	
Resident Agent		
201 N. Charles Street 26th Floor	*	
Baltimore, Maryland 21201		
	*	

* * * * * * * * *

COMPLAINT

Anne Arundel County, Maryland, by its undersigned counsel, brings this complaint for injunctive and other relief against the Defendant Annapolis Road, Ltd., and for cause states as follows:

1. Plaintiff, Anne Arundel County, Maryland

(hereafter referred to as "County") is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Anne Arundel County, Maryland.

2. By virtue of the express powers granted to it under the Annotated Code of Maryland, Article 25A ("the Express Power Act"), including Article 25A, Section 5(S), the County is authorized to enact local laws, "as may be deemed expedient in maintaining the peace, good government, health and welfare of the county."

3. Bill No. 98-91 was read and passed by the Anne Arundel County Council on November 18, 1991, and provided that adult film arcades, commonly known as peepshows, are particularly likely to promote illicit sexual conduct in commercial establishments, and require licensure and regulation in order to protect the health and welfare of County citizens.

4. Article 16, Title 2, Subtitle 11, of the Anne Arundel County Code, governs the issuance of County licenses for adult film arcades by the Anne Arundel County Department of Inspections and Permits. See Article 16, Section 2-1101 et seq., Anne Arundel County Code.

5. Article 16, Section 2-1101(b)(1) of the Anne Arundel County Code defines an "adlilt film arcade" as

> any place in which one or more display devices are maintained to show images for commercial entertainment or amusement purposes, and where the images are characterized by the depiction or description of sadomasochistic abuse, sexual conduct, or sexual excitement, as those terms are defined in Article 27, S416A of the State Code.

6. Article 16, Section 2-1102 states that a "Class Y" County license is required to place, operate, or maintain an adult film arcade. Article 16, Section 2-1109(a) prohibits a person from owning or operating a business or other establishment that includes an adult film arcade without a "Class Y" license. Section 2-1113(a) allows the County to seek injunctive relief to prohibit an adult film arcade from being placed or maintained in use or operation without a valid Class Y license.

7. Defendant Annapolis Road, Ltd., owns and operates a business located at 1656 Annapolis Roadt Oden ton, Anne Arundel County, Maryland 21113.

8. The business owned and operated by Annapolis Road Ltd. at 1656 Annapolis Road includes an adult film arcade.

9. No Class Y license has been obtained by Annapolis Road, Ltd., from the Anne Arundel County Department of Inspections and Permits for the adult film arcade located in its business at 1656 Annapolis Road, Odenton, Anne Arundel County, Maryland.

WHEREFORE, Plaintiff prays:

A. That the Defendant Annapolis Road, Ltd. be ordered to cease operation of the adult film arcade located at 1656 Annapolis Road, Odenton, Anne Arundel County Maryland, until a Class Y license is obtained for the adult film arcade.

B. That the Defendant be permanently enjoined from placing, operating, or maintaining an adult film arcade at any location in Anne Arundel County without a Class Y license having been obtained for the adult film arcade.

C. That the Defendant be ordered to pay the costs of this proceeding.

D. And for such other and further relief as the nature of this cause may require, including but not limited to ex parte and interlocutory injunctive relief upon motion of the Plaintiff.

JUDSON P. GARRETT, JR.
County Attorney

David A. Plymer
Deputy County Law
44 Calvert Street
P.O. Box 2700
Annapolis, MD 21404
(410) 222-1316

ANNE ARUNDEL COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
	*	FOR
v.		
	*	ANNE ARUNDEL
COUNTY		
ANNAPOLIS ROAD, LTD.		
	*	CASE NO.
Defendant		
	*	

* * * * * * * * * **

MOTION FOR EX PARTE AND INTERLOCUTORYINJUNCTIONS

Anne Arundel County, Maryland, by its attorney, David A. Plymyer, Deputy County Attorney, in accordance with Maryland Rules BB70 and 72, requests that this Court issue ex parte and interlocutory injunctions in the above captioned matter prohibiting the Defendant from maintaining in use and operating the adult film arcade located at 1656 Annapolis Road, Odenton, Anne Arundel County, Maryland without a valid Class Y license issued by the Anne Arundel County Department of Inspections and PL=rmits, and for cause states as follows:

1. The averments as contained in the Complaint filed in this action are incorporated by reference hereto.

2. On December 3, 1992, Anne M. Hatcher, Chief of Licensing of the Anne Arundel County Department of Inspections and Permits, and Detective William L. Corbett of the Anne Arundel..County Police Department, inspected the business premises at 1656 Annapolis Road, Odenton, Anne Arundel County, Maryland, and observed in use and operation display devices maintained to show images for commercial entertainment or amusement purposes, where those images were characterized by the depiction of human sexual intercourse, human masturbation, and touching and contact with genitals, all of which is defined as sexual conduct, as those te=s are defined in Article 27t Section 416A of the Annotated Code of Maryland. See Affidavit of William L. Corbett, attached and incorporated hereto as Motion Exhibit A and Affidavit of Anne M. Hatcher, attached and incorporated hereto as Motion Exhibit B.

3. The owner and operator of the business at 1656 Annapolis Road which includes the adult film arcade is Annapolis Road, Ltd. See Affidavit of Anne M. Hatcher, and true test copy of State of Maryland Trader's License No. 0230298902302989, attached and incorporated by reference hereto as Motion Exhibit C.

4. No Class Y license has been-obtained by Annapolis Road, Ltd. for the adult film arcade located at 1656 Annapolis Road, Odenton Anne Arundel County, Maryland. See Affidavit of Anne M. Hatcher, Motion Exhibit B.

5. In July, 1991, Detective Darryl R. Hagner of the Anne Arundel County Police Department and Ms. Hatcher inspected the same premises and observed the unlicensed operation of the display devices. At that time, Defendant Annapolis Road, Ltd voluntarily ceased operation of the devices.

6. The resumption of the use and operation of these display devices as an adult film arcade in the business owned and operated by the Defendant Annapolis Road, Ltd. without a valid Class Y license is a violation of Article 16, Section 2-1102 and Section 2-1109 of the County Code, and subject to injunctive relief under the provisions of Section 2-1113.

7. The adult film arcade operated by the Defendant does not meet current licensing standards and is configured in such a manner that it is likely to promote illicit sexual conduct through the use of enclosed viewing booths not subject to the visual supervision by the store manager. See Affidavit of Anne M. Hatcher, Motion Exhibit B.

8. It is a matter of settled federal constitutional law that cities and counties may enact ordinances governing the interior-configuration of adult antertairment "Peepshows" in order to discourage their use for sexual conduct. See e.g. Wall Distributors, Inc v. City of Newport News, Virginia, 782 F.2d 1165 (4th Cir. 1986), and Bamon Corporation v. City of Dayton, 923 F.2d 470 (6th Cir. 1991).

9. In acting to enforce its ordinance under these circumstances, the Plaintiff County is relieved from the traditional equitable requirements of demonstrating immediate, substantial and irreparable injury. See Joy v. Anne Arundel County, 52 Md.App. 653, 660 (1982). To allow Annapolis Road, Ltd. to continue to flout the licensing ordinance constitutes an immediate, substantial and irreparable injury to the County's ability to maintain a licensing scheme, allowing the Defendant to benefit from its illegal activity pending issuance of a valid license. Additionally, actual immediate, substantial, and irreparable injury will result, as the harm targeted by the licensing ordinance, illicit sexual activity in adult film arcades, is likely to continue on the

premises until the adult film arcade complies with the licensing ordinance. See Affidavit of Anne M. Hatcher, Motion Exhibit B.

WHEREFORE, the Plaintiff Anne Arundel County, Maryland, requests the following relief:

A. That an ex parte injunction be issued enjoining the Defendant Annapolis Road, Ltd. from using or operating an adult film arcade on the premises at 1656 Annapolis Road. Odenton, Anne Arundel County, Maryland 21113, pending an adversary hearing in this matter.

B. That after an adversary hearing an interlocutory injunction be issued enjoining the Defendant Annapolis Road, Ltd- from using or operating an adult film arcade an the premises at 1656. Annapolis Road, Odenton, Anne Arundel County, Maryland 21113, pending a final judgment in this matter.

C. That the Plaintiff, a political subdivision of the State of Maryland, be relieved from the requirement of a bond or other security in accordance with Maryland Rule BB75(b)(2).

D. For such other and further relief as the nature of this cause may require.

JUDSON P. GARRETT, JR.
County Attorney

David A Plymyer
Deputy County Attorney
Office of Law
44 Calvert Street
P.O. Box 2700
Annapolis,MD 21404
(410) 222-1316

ANNE ARUNDEL COUNTY, MARYLAND A Body Corporate and Politic Arundel Canter 44 Calvert Street Annapolis, Maryland 21401	*	IN THE CIRCUIT COURT FOR
Plaintiff	*	ANNE ARUNDEL COUNTY
VS.	*	CASE NO. C-9212565
ANNAPOLIS ROAD, LTD. A Delaware Corporation registered to do business at 1656 Annapolis Road Odenton, Maryland 21113	*	
Defendant	*	

* * * * * * * * * * **

NOTION TO DISMISS
AND IN OPPOSITION TO INJUNCTION

Now comes ANNAPOLIS ROAD, LTD., Defendant, by and through William E. Seekford, Esquire, its counsel and pursuant to Rule 2322 moves the Court to dismiss the within Complaint and for reasons states:

I. That the Complaint fails to state a claim upon which relief can be granted.

1. The Complaint seeks to enforce Bill lio. 98-91, enacted, as amended, on November la, IL991 which purported to be an

emergency measure but which is void on its f ace as a tax and revenue measure proscribed under Charter Section 307(i) in that it compels the payment by Defendant to Plaintiff of revenue in the mandatory minimum assessment of $2,500.00 or $300-00 per device, per annum, whichever is greater in addition to any traders license fees, amusement device fees and taxes. Suck revenue is assessed as a flat tax unrelated to measured proof of reasonable regulatory costs. Further said licensing revenue and taxation assessment for the right to use real property prohibited under the Charter and laws as exceeding the rate of inf lation and increased assessment cap for commercial properties.

2. The Complaint seeks to enforce Bill No. 98-91, as aforesaid when the same is void and unenforceable on its face in violation of Charter Section 307 in that it invalidly embraces more than ons subject, i.e., (1) the subject of Article 16 License and Permits, "Licensing of adult film arcades"; (2) licensing of exhibition of obscene ma tter; (3) the subject of criminal provision and creating duplicated criminal provisions as to Article 27, Section 418 for enforcement under Section 2-1109; (4) creating duplicate criminal provisions as Article 27, Section 416B, 416C and 416E for enforcement under Section 3-403(b) (10) (3) and (4); (5) the subject of zoning of land use and provisions under Article 28 Zoning with related nonconforming use and amortization provisions; (6) the subject of administrative hearing law and appeals to the Court Board of Appeals under Article 3; and (7) creating a new tax and revenue source measure for the county.

3. The Complaint unconstitutionally seeks to enforce Bill No. 98-91, as aforesaid when the same is void and unenforceable on its face in that it seeks to license, zone, regulate, or impose criminal penalties based upon the content of speech, press, and expression materials withouz adequate factual basis for such

legislation, that it is appropriately narrowly Tailored to achieve a proper objective, that it is no more restrictive than necessary to achieve that objective and imposes intol@le burdens upon First Amendment activities which are not unrelated to the suppression of free expression and are not incidmtal burdens thereon.

4. The Complaint unconstitutionally seeks to impose and enforce an additional substantial licensing tax upon Def@ant for its First Amendment rights and exercises thereof by enposing a flat tax of $2,700.00 upon the use of the place of discrimination (applied through $300-00 for each of 9 devices at the premises for such speech activities which sum is greater than the minimum tax of $2,500.00 for any such premises) which is not imposed generally upon all businesses in the county and it targets small exhibitors as it specif ically excludes a motion picture theater that has seating for at least 50 persons per screen. That there was presented no f actual evidence to the Council to establish affirmative proven costs for such prohibited "flat" tax. Further the same is an invalid flat tax rate based upon the amount of exhibitions available and upon the amount of projection equipment thus imposing a taxation impediment causing a cap on additional expression activities not applicable to other similar disseminators at theater premises.

5. That Bill No. 98-91 is void and unlawful in requiring a license and payment of a license tax to engage in criminal conduct prohibited by Article 27, Section 416A and 416D which is beyond the power of the County.

6. That Bill No. 98-91 is void and Unlawful in attemor-ing to grant the right of unreasonable warrantless entries, searches, and seizures of premises and materials under the First Amendment in violation of the First, Fourth and Fourteenth Amendments as well federal law under Title 18, U.S.C., ss2710 (The Robert Bork law), Title 42, U.S.C., ss2OOOaa (search and

exhibitions available and upon the amount of projection equipment thus imposing a taxation impediment causing a cap on additional expression activities not applicable to other similar disseminators at theater premises.

5. That Bill No. 98-91 is void and unlawful in requiring a license and payment of a license tax to engage in criminal conduct prohibited by Article 27, Section 416A and 416D which is beyond the power of the County.

6. That Bill No. 98-91 is void and Unlawful in attemor-ing to grant the right of unreasonable warrantless entries, searches, and seizures of premises and materials under the First Amendment in violation of the First, Fourth and Fourteenth Amendments as well federal law under Title 18, U.S.C., ss2710 (The Robert Bork law), Title 42, U.S.C., ss2OOOaa (search and seizure of broadcast and public communications without probable cause of a criminal offense related to such materials).

7. That there was no adequate, reasonable and necessary evidence presented to the Council by testimony or otherwise of any harmful secondary effects emanating from a premises described in Bill No. 98-91 as set forth in amendments to Article 16, Section 2-1101. (B) and (C) to support this legislation.

8. That this licensing law is unconstitutional and invalid for its failure to specifically set forth in its terms adequate procedural safeguards and grants unbridled discretion to the licensing authorities herein and is impermissibly void for vagueness and overbreadth in regulating exhibition premises.

9. That this ordinance unconstitutionally grants unbridled discretion to the licensing officials making the peaceful enjoyment of these constitutional freedoms by Defendant contingent upon the uncontrolled will of those officials including,

inter alia, reauiring (1) the filing of an application in the form prescribed by the department leaving to the discretion of the discretion of that official whate the form required, (2) filing a copy of a "Zoning Certificate of Use" which must be filed before the issuing official will even receive or consider the application form which Certificate of Use itself must be applied for on a form prescribed and if not issued Within 30 days of application it is considered a denial without any stated reasons. Such denial can be appealed by the applicant to the county Board of Appeals to be heard and decided within 60 days and if not so decided the denial below is automatically affirmed. Judicial review thereafter is not an expedited one and just the denial of a "Zoning Certificate of Use" could extend at least well beyond 90 days without expeditious judicial review. Compounding this discretion and unreasonable delay is the further provision that approval or rejection is to be made within 30 days of the receipt of a completed application and zoning certificate but a simple failure to approve or deny the license is a silent denial without reason or justification and thus cannot be overcome on appeal of the reasons for denial.

10. That the regulation of dissemination within the parameters of Article 27, Section 416A, 416B, 416C, 416F and 418 are preempted by state general laws and the County has not been -granted the right under the Express Powers Act of Article 25A to base license issuance upon criminal conduct proscribed by state law.

11. That this ordinance also unconstitutionally predicates its aoplication for zoning and licensing upon the dissemination of private human use devices under 21, U.S. C. , ss360K(a) and the Code of Federal Regulations pre-empting state regulation as well
as those swmal contraceptive and birth control materials protected

from state regulation under the Fourteenth Amendment and Carey v. Population Services, nt'l , 431 US 678, including but not limited to, 21, C.F.R., ss884-5300, 5310, (condom devices),21, C.F.R., ss884.5940, 5960, (battery operated dildos) ,etc.

12. That the application is an admission of conduct violative of Article 27, Section 416, 418 and thus a denial of dus process to compel the same so as to obtain a license for such conduct.

13. That the Bill denies equal protection and imposes unlawful discriminatory application upon Defendant while exempting other classes of businesses with the same product from its provisions.

14. That the Bill is applied to Def endant on the basis of the content of the speech material and conduct engaged in.

II. That the Defendant has filed several prior applications for a Class "Y" Amusement license and submitted the fees therefore but has been unconstitutionally denied the license since 1972 and is entitled to disseminate without the wrongfully denied license.

III. That the Def endant is entitled to rely upon the ruling of this Court by Judge Bruce Williams in 2020c West Street v.Anne Arundel County where he ruled that preliminary injunctions and summary judgment in favor of the county was not justified under this statute.

IV. That the Defendant and one other similar establishment are the only two operating in the County and have been for some 15 or more years without causing any adverse secondary effects or other justification for such licensing and thus the law is content based upon the speech itself and is unequally applied by exempting all other such places and businesses where

one or more display devices are used to produce similar images.

WHEREFORE, Defendant prays the same upon hearing be dismissed.

Respectfully submitted,

WILLIAM E. SEEKFORD, ESQUIRE
Suite 1302, The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(410) 821-6868
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby declare and affirm that I served a copy of the Defendant's Motion upon the Plaintiff by hand delivery to counsel, David A. Plymyer, Esquire, Deputy Law Director, 44 Calvert Street, Annapolis, Maryland 21404 this 16th day of December, 1992.

WILLIAM E. SEEKFORD, ESQUIRE

ANNE ARUNDEL COUNTY, MARYLAND A Body Corporate and Politic Arundel Center 44 Calvert Street Annapolis, Maryland 21401	*	IN THE CIRCUIT COURT
Plaintiff	*	
V.	*	FOR
ANNAPOLIS ROAD, LTD. A Delaware Corporation registered to do business at 1656 Annapolis Road Odenton, Maryland 21113	*	ANNE ARUNDEL COUNTY
Defendant	*	CASE NO. C-9212564
Serve on: Stuart R. Rombro, Resident Agent 201 N. Charles Street 26th Floor Baltimore, Maryland 21201	*	

* * * * * * * * * ***

ORDER GRANTING EX PARTE INJUNCTION

Upon the consideration of the Motion for Ex Parte and Interiocutory Injunctions and upon the finding by this Court that:

(1) It is likely that Plaintiff Anne Arundel County will succeed on the merits of its Complaint that the Detendant Annapolis Road, Ltd. is operating an "adult film arcade" as defined in Article 16, Section 2-1101(b)(1) of the Anne Arundel County Code without a valid Class Y license issued by tte County as required by Article 16, Sections 2-1102 and 2-1109(a) of the Anne Arundel County Code;

(2) Greater injury would be done by refusing issuance of this injunction than would be done to the Defendant by granting the injunction, as the Plaintiff Anne Arundel County would suffer irreparable injury unless the injunction is granted in order to protect the integrity of its licensing scheme intended to deter illicit sexual conduct in such adult film arcades, and

(3) The public interest compels issuance of the injunction to prevent the Defendant Annapolis Road, Ltd. from operating an adult film arcade until it complies with the requirements of the County's licensing ordinance.

THEREFORE, it is this _____ day of_____ 1994, at _____ a.m./p.m.

ORDERED, that an ex parte injunction be and hereby is issued ainst the Defendant, restraining and enjoining it, and any one acting for it or on its behalf, including its employee, Alan Stokes, from using or operating an adult film arcade on the premises at 1656 Annapolis Road, Odenton, Anne Arundel County, Maryland 21113; and it is

FURTHER ORDERED, that the Defendant shall have leave to move for a hearing on this ex parte injunction on not more than two days notice; and it is

FURTHER ORDERED, that this ex parte injunction shall

expire on December _____ 1992, with a hearing on the Plaintiff's Motion for Interlocutory Injunction to be scheduled on that date at _____ a.m./p.m. and it is

FURTHER ORDERED, that the Plaintiff, a political subdivision of the State of Maryland is relieved from the requirement of a bond or other security in accordance with Maryland Rule BB75b.2.

Judge Circuit Court for Anne Arundel County

ANNE ARUNDEL COUNTY, MARYLAND	*	IN IIHE
PLAINTIFF	*	CIRCUIT COUNT
vs.	*	FOR
ANNAPOLIS ROAD, LTD.	*	ANNE ARUNDEL COUNTY
DEFENDANT	*	CASE NO. C-92-12565

COURT'S OPINION BEFORE
HON. H. CHESTER GOUDY, JR.
December 18, 1992

Present:
David A. Plymyer, Esq., Deputy County Solicitor
William E. Seekford, Esq., Attorney for Defendant
Donna Patrick, Deputy Clerk

PUBLISHER'S NOTE:

The following page is unavailable for filming:

A-54

COURT'S OPINION

All right, as I see it, the facts are that back in 1991, in August, the Defendant ... the Respondent in this case, applied for a license. That license was ultimately denied by the County because there was a moratorium placed in effect. The law that was in position at that time wasnot the law that's in position now. That .. the law had been changed. Apparently, It was rescinded or revoked and a new statute became in existence in November ot 1991. In any event, for whatever purpose it is, the Court finds that the action by Ms. Hatchback in 19 ... in August was no inappropriate. She found an application that was blank In a place where the application required there to be a license. That was the entertainment license, I believe, or some other license other than this particular license. This being a request for a Class Y license. It
was blank. She thought it was appropriate. It was blank. She sent it back. She, also, thought that there was more macnines than what the application asked for or a different number of machines than what the application stated and she returned it to the adplicant at that time. And, aoparently those croblems were rectified.

In the meantime, on August 5th or thereabout, the County (Council passed an ordinance placing a moratorium on Class Y licenses and thereafter the executive signed that moratorium and the license was not granted.

We have a period of say less than ten clays in which the County had this and was pursuing the application.

And, I find that not to be unreasonable under the circum-

stances of the case.

Now, back to ... I find that the question here, as I see it is, is the current statute unconstitutional and is the County's interpretation of it unconstitutional or their administration of it unconstitutional. For whatever purpose, I've ... that the racts of what happened in August of 1991 are the reasons why I make the findinq that I do.

The point ... the factual situation now is, is that we have the law that we currently have that requires a Class Y license. And, we have, factually, the Responaent-Defendant operating without a license. And, the County comes to the Court asking hor an injunction, which the Court signed a temporary injunction.

Now, the issue before Court is whether or not interlocutory order should be granted. On the face of what the ... that's probably the wrong in the context or this case to make that Kind of ... sav "on the face". From what the Court finds that's been presented, the Court finds that the statute that exists is not vague. It is not over-breadth. It is subject to inter ... reasonable interpretation.

That, the conduct that Is or was prior to injunction being performed on the premises falls within the statute.

That, this ... the factual prohibition of this statute has to do with the facility, not the words, not the statements, not the showing. It's the facility of communication. Not the communicative interest itself.

That, the County has ... it hasn't been shown that the County's interest is not unreasonable. That, it appears to the Court that the County's interest is reasonable. And, the new statute provides for reasonable restraints and restrictions upon the ... a business of this nature. it hasn't been shown that It's unreasonable. And, just from reading the statute, it appears to be reasonable to me. Though, there's no evidence which I make that factual finding. I don't know that there's any ... that is necessary other than what the Court has has heard that is being conducted on the premises, which I've found as matter as a fact and falls ... that conduct does fall within the purview of the statute.

I find that the sexual activity that is described is described to a sufficient degree to fall under a licensing statute. That the fee that is charged ... there's been no evidence that the fee is unreasonable.

This is a direct attack, as I said before, a direct attack on tne statute saying that my onstitutional rights are being intringed upon, therefore, I do not have to apply for such a license. And, I find that to be an inappropriate analysis ot the situation and that the licensing statute is constitutional and enforceable.

And, I find that the public and the county has a right to have its laws enforced and that it's inferred that a reasonable inference that harm will come to the County if they are not enforced. And, that it's anpropriate for the Court to continue the injunction on an interioctory basis. I find no preemption by the federai code. And, I'll sign an appropriate order to that effect.

* * * * * *

I hereby certify that the foregoing is a true and bona fide transcript of the Court's Opinion in the case of Anne Arundel County, Maryland versus Annnapolis Road, Ltd. Case No. C-92-12565 in the Circuit Court for Anne Arundel county on the 18th day of December, 1992.

Conchita D. Tuers, Court Reporter

ANNE ARUNDEL COUNTY, MARYLAND A Body Corporate and Politic Arundel Center 44 Calvert Street Annapolis, Maryland 21401	*	IN THE CIRCUIT COURT
Plaintiff	*	
V.	*	FOR
ANNAPOLIS ROAD, LTD. A Delaware Corporation registered to do business at 1656 Annapolis Road Odenton, Maryland 21113	*	ANNE ARUNDEL COUNTY
Defendant	*	CASE NO. C9212564

* * * * * * * * * ***

ORDER GRANTING INTERLOCUTORY INJUNCTION

Upon the consideration of the Motion for Ex Parte and Interlocutory Injunctions and upon the finding by this Court after an adversary hearing on the matter on _____ 1992, that:

(1) It is likely that the Plaintiff Anne Arundel County will succeed on the merits of its Complaint that the Defendant Annapolis Road, Ltd. is operating an "adult film ,arcade" as defined in Article 16, Section 2-1101(b)(1) of the Anne Arundel County Code without a valid Class Y license issued by the County as required by Article 16, Sections 21102 and 2-1109(a)

of the Anne Arundel County Code;

(2) Greater injury would be done by refusing issuance of this injunction than would be done to the Defendant by granting the injunction, this Court having found that the Defendant did reopen its adult film arcade without a valid Class Y license, and that maintenance of the status quo dictates that the adult film arcade remained closed until a valid Class Y license is issued, and

(3) Plaintiff Anne Arundel County would suffer irreparable injury unless the injunction is granted in order to protect the integrity of its licensing scheme intended to deter illicit sexual conduct in such adult film arcades; and (4) The public interest compels issuance of the injunction to prevent the Defendant Annapolis Road, Ltd. from operating an adult film arcade until it complies with the requirements of the County's licensing ordinance.

THEREFORE, it is this _____ day of _____, 1992, at _____ a.m./p.m.

ORDERED, that an interlocutory injunction be and hereby is issued against the Defendant, restraining and enjoining it, and any one acting for it or on its behalf, including its employee, Alan Stokes, from using or operating an adult. film arcade on the premises at 1656 Annapolis Road, Odenton, Anne Arundel County, Maryland 21113; and it is

FURTHER ORDERED, that this interlocutory injunction shall remain in effect until further order of this Court or until a determination of the merits of the action.

FURTHER ORDERED, that the Plaintiff, a political subdivision of the State of Maryland is relieved from the requirement of a bond or other security in accordance with Maryland Rule BB75b.2.

_____

Judge
Circuit Court for Anne Arundel County

ANNE ARUNDEL COUNTY, MARYLAND A Body Corporate and Politic Arundel Center 44 Calvert Street Annapolis, Maryland 21401	*	IN THE CIRCUIT COURT FOR
Plaintiff	*	ANNE ARUNDEL COUNTY
VS.	*	Case No. C9212564
ANNAPOLIS ROAD, LTD. A Delaware Corporation registered to do business at 1656 Annapolis Road Odenton, Maryland 21113	*	
Defendant	*	

* * * * * * * * * ***

NOTICE OF APPEAL

M. CLERK:

Please enter an appeal to the Court of Special Appeals of Maryland from the orders granting an injunction against Appellant and the refusal to dissolve the injunction against Appellant herein pursuant to C. & J.P. Article, Sections 12-303 (3) (i) and (ii).

WILLIAM E. SEEKFORD, ESQUIRE
Suite 1302, The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(410) 821-6868
Counsel for Appellant

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 134
September Term, 1993

ANNAPOLIS ROAD, LTD.

V.

ANNE ARUNDEL COUNTY, MARYLAND

Bloom,
Cathell,
Harrell,

PER CURIAM

Filed: November 3, 1993

Annapolis Road, Ltd., appellant, seeks dissolution of an ex parte Temporary Restraining order and Interlocutory Injunction issued by the Circuit Court for Anne Arundel County (Goudy, J.), which prohibits appellant from operating an adult film arcade on its leased business premises without the benefit of a Class Y license issued by the Anne Arundel County Department of Inspections and Permits.

PROCEDURAL BACKGROUND

On 4 December 1992, Anne Arundel County, Maryland, (the County) filed a Complaint in the Circuit Court for Anne Arundel county, seeking injunctive relief against appellant, Annapolis Road, Ltd. (Annapolis Road), to prevent Annapolis Road from operating an "adult film arcade"' until it obtained a County "Class Y" amusement license. A Motion for Ex Parte and Interlocutory Injunctions accompanied the Complaint.

On 7 December 1992, the Circuit Court for Anne Arundel County issued the ex parte injunction, prohibiting appellant's operation of the adult video machines operating on its premises at 1656 Annapolis Road in odenton. The ex parte injunction provided that it would expire on 16 December 1992, on which date a hearing would be held on the Motion for Interlocutory Injunction. The hearing began on 16 December 1992 and was continued to 18 December 1992. At the conclusion of the hearing, the court rendered its opinion and issued an order granting the interlocutory injunction. The injunction prevented Annapolis Road from using or operating an adult film arcade on its premises, pending a determination of the issues presented in the Complaint.

Appellant filed a Notice of Appeal to this court on 7 January 1993. On the following day, appellant filed a Motion for Stay in the circuit court, requesting that enforcement of the injunction be postponed during the pendency of its appeal. The motion was denied by an order of the circuit court dated 29 January 1993.

A subsequent Motion for Stay filed in this court was denied by order entered 9 February 1993.

FACTS

On 15 July 1991, Anne Arundel County Council Bill No. 68-91 was introduced before the Anne Arundel county Council. The purpose of Bill 68-91 was to impose a moratorium on the issuance of Class Y amusement licenses for private, adult entertainment, film-viewing machines, popularly referred to as "peep shows". The legislation sought to halt the issuance of new or renewed licenses until specific standards for the location and operation of such devices could be promulgated. Bill 68-91 was signed into law on 7 August 1991, took effect the same day, and provided that the moratorium would remain in effect until I December 1991.

On 29 July 1991, Anne M. Hatcher, Chief of Licensing for the Anne Arundel County Department of Inspections and Permits (the Department), made an inspection of Annapolis Road's business at 1656 Annapolis Road in the odenton community of Anne Arundel County. Hatcher notified Alan Stokes,, the owner and manager of Annapolis Road, that a Class Y license was required to operate adult viewing booths in the County. On that date, Hatcher presented Stokes with a copy of the local licensing law in effect as of 29 July 1991 and a County-prescribed form application to apply for the license.

Subsequently, on 1 August 1991, Stokes presented a license application and fee on behalf of Annapolis Road to the Department. Annapolis Road failed to respond to a part of the application calling for the applicants admission and amusement tax account number. According to the licensing ordinance. S 2-1103(8), information related to the payment of amusement taxes was a necessary component of a complete application.

On that same day, Hatcher reviewed the application and found

it incomplete. On 3 August 1991, she sent the application back to Stokes along with an explanatory letter. In the letter, Hatcher requested Stokes to complete the application by listing Annapolis Road's Admission and Amusement Tax Account number in the space provided.' She also requested clarification concerning the number of film viewing machines in operation as well as the names of the owners of the property on which Annapolis Road was located.

Stokes received the letter on 5 August 1991, and promptly showed it to his attorney. On 6 August 1991, the attorney sent a reply letter and an accompanying notarized addendum to the application. The letter provided some of the information requested, but protested the validity of the "Amusement Account Number" requirement. It is unclear on what specific date Hatcher received the reply letter and addendum from the attorney.

The moratorium went into effect on 7 August 1991, and the Deparmtnet took no further action on Annapolis Road's application. According to Stokes, following the onset of the moratorium, Annapolis Road voluntarily shut down the adult film arcade portion of its operations for "tow or three months." Annapolis Road continued, however, to operate its video tape rental and sales operations.

On 21 November 1991, Bill No. 98-91 (not to be confused with the moratorium legislation, Bill 68-91) went into effect. This ordinance set new standards for licensing of peep show machines, which no longer were licensed individually, but were licensed collectively as an "adult film arcade." The moratorium imposed by Bill No. 68-91 expired on 1 December 1991, and Annapolis Road was free to reapply for a Class Y license under the new standards.

Annapolis Road elected not to re-file for a Class Y license, but instead chose to re-open its adult film arcade. Hatcher discovered this on 3 December 1992, when she and plainclothes Detective Corbett of the County Police made an inspection of appellant's business.

Initially, Alan stokes prohibited Hatcher from observing the viewing booths located in the rear of the store. According to Stokes, women were not permitted in that area. Corbett went to the viewing booth area on his own. A few minutes later, however, Stokes permitted Hatcher to inspect the viewing booths after apparently checking the area for uniformed police. Hatcher and Corbett inserted coins into the viewing machines to verify the sexual content of the videos shown. After Hatcher discovered the operation of the adult film arcade, the Department filed an enforcement action to prevent Annapolis Road from operating its adult film arcade without a Class Y license.

The injunction resulting from Annapolis Road's failure to acquire a Class Y license does not restrict, in any way, appellant's ability to market or disseminate its material in any other manner than through the forum of "peep shows".

ISSUES

We have re-organized and re-phrased appellant's arguments as follows:

The licensing ordinance illegally requires that the depictions or descriptions portrayed on the display devices be obscene for the display devices to constitute an adult film arcade.

II. The injunction issued by the circuit court abridges appellant's rights under the First Amendment.

A. The injunction was issued based on Annapolis Road's failure to comply with a County ordinance which unconstitutionally restricts the content of speech.

B. Imposition of the injunction violated the "status quo requirement".

III. The adult film arcade ordinance confers "unbridled discretion" on administrative officials in violation of the First Amendment.

IV. Bill No. 98-91 was enacted invalidly as an emergency ordinance.

V. The adult film arcade license fee renders the ordinance invalid on its face.

VI. Bill No. 98-91 invalidly embraces more than one subject.

VII. The trial court abused its discretion when it closed the adult film arcade pending final adjudication of the complaint filed by the County.

I.

Finding no merit in any of appellants claims, we shall affirm.

Appellant argues that the reference in the ordinance, at Article 16, 5 2-1101 (b) (1) , to the definitions found in Article 27, S 416A of the Annotated Code of Maryland requires that the depictions or descriptions displayed on the devices must be "obscene" for the devices to constitute an adult film arcade. According to appellant, therefore, the licensing ordinance is "invalid and unconstitutional on its face," because it authorizes criminal conduct, the illegal depiction of obscene materials, as defined by the Code. In essence, Annapolis Road equates the terms "sadomasochistic abuse, sexual conduct or sexual excitement", as defined by the Code, with "obscenity". Annapolis Road, however, has obviously overlooked the judicial standard by which a trier of fact must evaluate materials to determine whether or not they are, in fact, "obscene".

In Miller v. California, the Supreme Court defined the test to determine if speech is obscene, and therefore, beyond the protection of the First Amendment:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would f ind that the work, taken as a whole, appeals to the prurient interest; (b) whether the work de "icts or describes, in a patently offensive way, sexual conduct specifically def ined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24-25, reh. denied, 414 U.S. 881 (1973) (citations omitted). Thus, according to Miller, determination of which materials constitute obscene forms of speech is an inquiry that extends beyond any mere statutory definition to the objective

conclusions of the factfinder.

Maryland courts have adopted the Miller standard for evaluating obscenity. See Mangum v. Maryland State Board of Censors, 273 Md. 176, 185 (1974); Ebert v. Maryland State Board of Censo@, 19 Md.App. 300, 314-15 (1973). When the defining statute
is construed in light of the Miller standard, it becomes evident that the ordinance, on its face, does not warrant the display or depiction of obscene materials. only a subsequent determination by a trier of fact, considering the factors defined in Miller, could make illegal the content of the adult film arcade materials currently regulated by the ordinance.

Furthermore, we recognize that the definitional focus of Bill 98-91 is Maryland Code, Article 27, S416A, which defines the terms, "sadomasochistic abuse", "sexual conduct", and "sexual excitement". In comparison, S416D of the same article,, relying on these definitions, prohibits criminal conduct which stems from the unauthorized visual display of obscene materials for advertising purposes. We agree, therefore, with the County that appellant's reliance on the judicial interpretation of obscenity construed by the court in Smiley v. State, 294 Md. 461 (1982), is misplaced, because that holding was limited to the specific section creating the prohibited criminal act, Article 27, S416D, not the definitional section, S416A. The County correctly notes that "the scope of the County ordinance, which embodies the definitions found in S416A, extends to all material. . . commonly described by the courts as 'adult entertainment', not just to that material which is also obscene. 11 Thus, the obscenity inquiry is limited to the criminal acts prohibited by S416D.

In construing the licensing ordinance, discerning real legislative intent is the primary goal. Kline v. Fuller, 56 Md.App. 294, 309,

apreal after remand, 64 Md.App. 375 (1983). To accomplish this goal, we must read the ordinance in such a way as to avoid unjust, illogical, absurd, or unreasonable consequences. Id.

This argument forwarded by Annapolis Road is simply senseless. It is virtually inconceivable that the County Council would enact an ordinance to license conduct which is otherwise illegal under State law. Unlike 5416D, which, according to the court in Smiley, was enacted by the legislature to prohibit advertising depicting obscenity, Bill 98-91 is a civil ordinance clearly designed by the County council to authorize the licensing of adult film arcades subject to the applicant's satisfaction of specific requirements. In this regard, the distinction between the purposes behind S416D and Bill 98-91 is clear. The former section criminalizes commercial depiction of obscene materials as defined in Smiley, while the latter ordinance seeks to regulate adult materials not considered obscene by the Miller standard adopted in Smiley. The obvious inconsistencies in purpose between the two provisions precludes resolution of this issue in appellant's favor.

It was clearly not the intent of the ordinance that the requirement of obtaining a Class Y license depend on a finding of obscenity. Appellant is not being compelled to incriminate itself in applying for the license. Based on the foregoing discussion, therefore, we conclude the ordinance does not condone criminal conduct through the depiction of obscene materials under the laws of this State.

II.

A.

Appellant claims that the trial court,s issuance of the interlocutory injunction abridged its rights secured by the First Amendment to the United States Constitution. Annapolis Road contends that the content of the speech contained in an adult film arcade caused enactment of the ordinance and the subsequent imposition of the injunction which violated appellant's right to free speech. Therefore, according to appellant, the "injunction is facially invalid as a prior restraint."

Ordinances enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. Renton v. Playtime Theaters, Inc. 475 U.S. 41, 46 (1986). In comparison, "content-neutral" regulations concerning the time, place, and manner of speech are acceptable "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Id. In Renton v. Playtime Theaters, Inc., the Supreme Court held that a zoning ordinance which treated adult motion picture theaters differently than other theaters was not a "content-based" regulation violative of the First Amendment. The court agreed with the trial court's conclusions that:

> (T]he Renton ordinance is aimed not at the content of the films shown at 'adult motion picture theaters.' but rather at the *secondary effects* of such theaters on the surrounding community. (The City Councills 'predominate concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves.

Renton, 475 U.S. at 47.

The ordinance at issue is completely consistent with the Supreme Court's definition of "content-neutral" speech regulations, as those which "are justified without reference to the content of the regulated speech." Virginia Pharmacy Board v. Virginia citizens consumer Council, Inc., 425 U.S. 748, 771 (1976). The ordinance focuses on requirements pertaining to one particular *manner of* dissemination, viewing booths located on commercial premises, rather than restriction of all adult sexually explicit material available for distribution. Therefore, the appropriate inquiry is whether Bill 98-91 is designed to serve a substantial governmental interest and provides for reasonable alternative avenues of communication. Clark v. community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

In Young v. American Mini Theaterg, the Supreme Court recognized a municipality's important "interest in attempting to preserve the quality of . . . life" of its citizens. 427 U.S. 50, 71 (1976). The First Amendment only requires that the municipality rely on evidence it reasonably believes relative to the problems it is attempting to address. Renton, 475 U.S. at 51-52. Such evidence may take the form of studies conducted or testimony taken by the municipality itself or even evidence compiled by other jurisdictions facing the same issue. 'See Renton, 475 U.S. at 51 ("We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the detailed findings summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance").

The "WHEREAS" preamble to the ordinance clearly states that the law was developed as a result of "testimony and other evidence" presented to the County Council, which led the Council to believe that adult entertainment establishments "have a harmful

effect on the area in that they are located and contribute to neighborhood blight." Appellant has not contradicted or challenged these legislative determinations in its brief or at oral argument. Consequently, it has not directed our attention to any place in the record that would support our questioning these conclusions. This demonstrates that the council had evidence before it from which to reach a reasonable conclusion that the ordinance was necessary to preserve its substantial interest in the prevention of the secondary effects which often accompany sexually oriented businesses.

The only remaining question then is whether reasonable alternative means of communication are available to Annapolis Road. If a regulation leaves other means intact by which to communicate the same message, one content-neutral barrier to delivery of that message will not invalidate the entire regulation. Clark, 468 U.S. at 295.

The injunction at issue in no way prevents Annapolis Road from selling or renting pictorial and video explicit sexual materials for its customers to transport out of the store. Indeed, that is apparently what it continues to do. Appellant failed to produce any evidence to suggest that the type of speech contained in the adult film arcade differed from that contained in the videos for rent or sale. Therefore, our view is in accord with that of the Fourth Circuit, which addressed this issue as it related to the County's imposition of the moratorium and the moratorium's effect on Annapolis Road's adult film arcade:

> To the extent that appellants (Annapolis Road] were able to show that there was an essential communicative element provided by the 'peep show' machines that could not be replaced by other material available in the store, its claim of prior restraint would perhaps have significant

> validity. Yet here there is no apparent communicative interest, and appellants fail to suggest one promoted with equal success by the renting or sale of other explicit materials.

Annapolis Road, Ltd. v. Hagner, No. 91-1205, slip. op. at 8 (4th Cir. June 2, 1992) (per curiam). The injunction imposed by the circuit court is the result of appellant's failure to comply with an ordinance affecting a particular form of communication, not the facility of communication itself. As such, we hold that the injunction does not constitute a prior restraint, because the ordinance does not abridge Annapolis Road's rights under the First Amendment.

B.

Appellant urges us to hold that the circuit court's issuance of the injunction violates the "status quo requirement" of the First Amendment embodied in Freedman v. Maryland, 380 U.S. 51 (1965). In Freedman, the Court held that a license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. 493 U.S. at 51. Freedman involved a censorship scheme through which state-appointed censors engaged in the unreviewable, direct censorship of films. In its opinion invalidating the censorship program, the court stated that the program failed to require the censors to issue their decisions within a specified reasonable of time during which the status quo must be maintained.

Appellant argues that this principle was recently re-embraced by the Court in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990). Apparently, in its reading of FW/PBS, Inc., appellant failed to recognize some major distinctions. An examination of FW/PBS, Inc. is warranted, however, because the facts in FW/PBS, Inc. are more comparable with the case sub iudice than with Freedman.

In FW/PBS, Inc., the city of Dallas enacted a comprehensive ordinance to regulate "sexually-oriented businesses" through various licensing, zoning, inspection, and civil disability provisions. Id. at 220-21. Various owners of "adult" businesses filed suit, alleging the ordinance suffered from a lack of important procedural safeguards.

The Supreme Court agreed with the business owners, but distinguished the facts from those in Freedman when it stated, "Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general Qualifications of each license applicant, a ministerial function that is not presumptively invalid." FW/PBS, Inc., 493 U.S. at 229 (emphasis added). This distinction was important, because it led the Court to excuse the city from "bear(ing] the burden of going to court to effect the denial of a license application.', Id. at 230. The Court held that ll(l]imitation on the time within which the licensor must issue (or deny) the license as well as the availability of prompt judicial review" satisfied the requirements of the First Amendment. Id. Because the licensing scheme did not "present the grave dangers of a censorship system," the Court concluded that the "full procedural protections set forth in Freedman. . . [were] not required." FW/PBS. Inc., 493 U.S. at 229.

What appellant apparently ignores is that the maintenance of the status auo sought in Freedman was based on a system that had been devoid of all judicial review of the censors' content-based determinations. The maintenance of the status quo in that case was necessary to protect the facility of the speech at issue.

In contrast, the injunction imposed by the circuit court against Annapolis Road was based on a content-neutral ordinance more akin to the licensing provisions at issue in FW/PBS, Inc..

FW/PBS, Inc. requires that the ordinance provide a reasonable time limitation on the rendering of licensing issuance decisions as well as review of those decisions. Bill 98-91 satisfies both requirements. Subtitle 2-1105(C) of the ordinance requires the Director to issue a grant or denial of the license "WITHIN 30 DAYS OF RECEIPT OF A COMPLETED APPLICATION." If the director fails to issue a license within 30 days, the "APPLICATION SHALL BE CONSIDERED A DENIAL, AND THE APPLICANT HAS AN IMMEDIATE RIGHT OF APPEAL TO THE COUNTY BOARD OF APPEALS." These provisions provide adequate safeguards against undue delays by licensing officials in approving or denying expressive activities protected under the First Amendment.

III.

Annapolis Road also argues that the ordinance in question conferred "unbridled discretion" on the Department of Inspections and Permits officials in violation of the First Amendment to the United States Constitution. Appellant claims that the County Council failed to specify the standards by which the administrative officials were to evaluate the Class Y applications. As a result, according to appellant, Ms. Hatcher rejected appellant's Class Y license application.

A licensing statue that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint. Lakewood v. Plain Dealer, 486 U.S. 750, 787 (1988). Only standards limiting the licensor's discretion will eliminate the danger of self-censorship created by the existence of such unfettered discretion. Id. at 758. The Supreme Court has emphasized the importance of such standards, stating:

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.

> Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression.

Lakewood, 486 U.S. at 758.

Such standards must be "narrow, objective, and definite" in order to guide the licensing authority. Shuttleworth v. Birmingham, 394 U.S. 147, 150-51 (1969). The Court has routinely struck down as facially invalid laws that, due to their complete lack of standards, result in discriminatory, content-based inhibitions of protected speech. See e.g., Forsyth County v. Nationalist Movement, 505 U.S. _, 112 S.Ct. 2395 (1992) (administrator making decision regarding how much to charge a group seeking to demonstrate or parade testified that he "based the [amount of the] fee on his own judgment of what [he] thought would be reasonable") ; Lakewood, 486 U.S. at 752 (only limitation placed on permit official who oversaw permit grants for newspaper racks was that he was required to state the reasons for denial of a permit).

A review of the Anne Arundel County Code, Hatcher's testimony, and Bill 98-91 provides sufficient evidence of set standards by which the Department must evaluate Class Y applications. The Department evaluates applications and inspects business premises according to the dictates of the County Code and the ordinance. Article 16, Section 2-104 of the County Code provides that:

> The Department is not required to make an investigation before the issuance of a license and may refuse to issue

> the license on the basis of the facts disclosed by the application. If on investigation by the Department it is found that the person requesting the issuance of a license required by this title has made a false statement in the application or that the operation of the devices at the proposed premises will create a nuisance or will be detrimental to the peace and welfare of the community, the Department may deny or revoke the license.

Hatcher testified that, as Chief of Licensing, she evaluated certain criteria to determine whether the grant of a Class Y license would affect detrimentally the peace and welfare of the community but, before such a decision could be made, both the Code and the ordinance required submission of a completed application f or review. Hatcher stated that, when evaluating a business's effect on the peace of a particular community, she would examine such factors as ability to exit and return, parking and traffic problems, and noise levels. She requested information that would influence her decision from various members of the area to be affected, such as community associations, County Council representatives, and the local police department.

The most specific standards related to procedures the for grant or denial of a Class Y license are contained in Bill 98-91. Subtitle 2-1103 lists specific requirements for application completion. Subtitle 2-1105(A) of the ordinance states that "THE DIRECTOR SHALL ISSUE A CLASS Y LICENSE IF THE APPLICANT MEETS THE REQUIREMENTS OF THIS SUBTITLE." In addition. subtitles 2-1105(B) and 2-1107 contain other specific requirements concerning zoning and operations to be followed before the Director may issue a class Y license. If the license is denied actively, the Director must "SPECIFY THE REASONS THAT THE LICENSE WAS DENIED."

All of these provisions and the testimony from Hatcher provide evidence of discernible standards by which courts could evaluate the existence of any discriminatory action by the Department concerning speech affected by the denial of a class Y license application. Furthermore, contrary to appellant's contentions, the ordinance makes clear that the Department is not free to add or modify the substantive information required in the Class Y license. Finally, the ordinance provides for expeditious review of the Department's denials. This ordinance, therefore, is not invalid by reason of a grant of unbridled discretion in the Department of Inspections and Permits; it sets forth specific guidelines that the Department must follow regarding the issuance, denial, and renewal of Class Y licenses.

IV.

Appellant seems to argue that Bill 98-91 has attributes of both a revenue-raising statute and a regulatory statute, and therefore, we should review the ordinance considering both standards. We, however, do not view the ordinance as a "hybrid" of the two. The ordinance is either a revenue-raising measure or a regulatory measure. It cannot be both.

In this regard, Annapolis Road first contends that the inclusion of the fee among the regulatory measures created by Bill No. 98-91 invalidates the law as an "emergency ordinance" because, according to Section 307(i) of the Anne Arundel County Charter, such ordinances may not levy taxes or "create revenue". We disagree with appellant's characterization of the ordinance as a revenue-raising measure.

In Maryland Theatrical Corporation v. Brennan, 180 Md. 377 (1942), the Court of Appeals distinguished between the nature of laws authorizing taxes and those regulating behavior through licensing:

> [W]here the fee is imposed for the purpose of regulation, and the statue requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is enacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.

Id. at 381, quoting 33 Am. Jur., Licenses, Paragraph 19, p. 340. Scrutiny of the ordinance reveals that Bill 98-91 was enacted as a regulatory measure. The prefatory remarks to the ordinance made by the County Council make clear that the primary purpose of Bill 98-91 was to "require regulation (of establishments

operating an adult film arcade] in order to protect the citizens of the County and their neighborhoods from nuisance and deterioration." Moreover, the ordinance sets forth numerous operational, inspection, and land use requirements which adult film arcade operators must follow in order to comply with the law. Thus, the licensing fee is but one component of the overall regulatory scheme developed by the County Council to alleviate the negative secondary effects associated with adult film arcades.

V.

Appellant also argues that the ordinance is facially invalid because it imposes an unconstitutionally unreasonable licensing fee upon parties seeking to operate an adult film arcade. Section 21104 of the ordinance provides that "THE ANNUAL FEE FOR A CLASS Y LICENSE IS $2,500 OR $300 FOR EACH DISPLAY DEVICE OR VIEWING BOOTH, WHICHEVER IS GREATER." According to Annapolis Road, this fee is an unreasonable, unnecessary "arbitrary figure." We do not reach the question on the merits, however, because appellant's questions concerning the fees reasonableness were beyond the scope of permissible questioning at the hearing.

During the hearing, the County called Ms. Hatcher to testify concerning the Department's inspections of appellant's leased business premises. She also stated that, based on the Department's records, no Class Y license had been issued to Annapolis Road. Her testimony on direct examination was essentially limited to these topics.

On cross-examination, however, the focus of questioning shifted from the facts of the case to the construction and constitutionality of Bill 98-91. Appellant's attorney initially requested Ms. Hatcher to explain what standards she used to

evaluate applications for Class Y licenses. Following this line of questioning, counsel for Annapolis Road requested Hatcher to define the "test of obscenity set forth in Smiley v. State", and inquired whether she had "conducted a study or any review for (the] purpose of determining the cost of administering this licensing statute on a yearly basis." On both occasions, Judge Goudy sustained the objections of the County's attorney.

In response to the second objection pertaining to the costs of administering the ordinance, appellant's counsel made a proffer to the court. Counsel for Annapolis Road contended that his crossexamination questioning related to the amount of the fee under the licensing ordinance was not beyond the scope of the direct examination. He argued that the constitutionality of the fee under the amended licensing ordinance was relevant to the time frame within which Annapolis Road would have had to pay had it properly completed its application for the Class Y license.' Judge Goudy listened to counsels proffer, accepted it, and reaffirmed his original ruling to sustain the objection.

In support of its position, appellant relied, both at trial and in its brief, on the recent Supreme Court decision in Forsyth County v. Nationalist Movement, 505 U.S., 112 S.Ct. 2395 (1992). This reliance is misplaced. In Forsyth County, the court struck down the provision of a local ordinance relating to fees as invalid on its face, because the ordinance unconstitutionally tied
the amount of the fee to the content of the speech. 112 S.Ct. at 2403. Under the county ordinance, an administrator was empowered to adjust the amount of a fee for a parade or other assembly on public property to meet the anticipated expenses of maintaining public order in connection with the licensed activity. The Court held that the discretion possessed by the administrator to assess the cost of security for parade participants, "necessarily (required the administrator to] examine the content of the

message conveyed." Id. at 2402 (administrator charged $100.00 for the Nationalist Movement, a primarily African American civil rights group, while charging $5.00 for the Girl scouts.).

Clearly, appellant confuses the position it purportedly forwards. The primary issue in Forsyth County was the unbridled discretion given to officials in determining the amount of the parade fee. The Court did not address the reasonableness of the fee fixed by the ordinance, because the fees charged by the officials in Forsyth County varied depending on the group seeking to assemble. We have already determined that the ordinance is not content-based and does not confer unbridled discretion upon the Department of Inspections and Permits in its administration. Thus, the holding in Forsyth County is inapposite to this issue.

The determination of the validity of regulatory fees is solely a question of law. Ocean City v. Purnell-Jarvis, Ltd., 86 Md.App. 390, 404 (1991). Courts may review a fee imposed by a regulatory measure to determine if the amount is reasonable and if it has a definite relation to the regulation-Is purpose. County Commissioners of Anne Arundel County v. English, 182 Md. 514, 520 (1943). In Ocean city v. Purnell-Jarvis, Ltd., we held that in determining whether site plan review and building permit fees were reasonable, testimony concerning projections of income and expenditures made by the city manager and city council would be admissible to determine whether the city council made a good faith effort to project or estimate costs of regulation and amount of income to be expected from the fees. 86 Md.App. at 410-11.

Had appellant properly understood English or Purnell-Jarvis, it would have been able to call Hatcher as its own witness to address the subject through direct examination. Annapolis Road, however, failed to establish the correct legal basis for its proffer.

Thus, Judge Goudy correctly curtailed the questions concerning the reasonableness of the fee, because they were indeed beyond the scope of appellant's appropriate cross- examination.

VI.

Annapolis Road also asserts that the ordinance is invalid because it embraces more than one subject. Specifically, Annapolis Road argues that because the ordinance contains both licensing and zoning regulations, it directly conflicts with the Anne Arundel County Charter, S 307(c), which states that each ordinance "shall embrace but one subject." This argument is completely without merit.

Section 307 of the Anne Arundel County Charter derives from Article III, Section 29, of the Constitution of Maryland. See Anne Arundel County Charter, S307, p. 21, Rer)orter's Note @c (1967).

The "one subject" limitation under the State constitution was enacted to "prevent the combination in one act of several and distinct incongruous subjects and to require that those interested be fairly appraised of the nature of the pending legislation." Panitz v. Comptroller, 247 Md. 501, 511 (1967). The Court of Appeals has long held that if several sections of a statute refer to and are germane to the same subject matter, the statute is considered as embracing but a single subject. Porten Sullivan corn. v. State, 318 Md. 387, 397-403 (1990); Baltimore v. Reitz, 50 Md. 574, 579 (1879).

By analogy, Bill 98-91, as authorized by the Anne Arundel County Charter, plainly deals with one subject matter, adult entertainment. Appellant correctly notes that the ordinance encompasses licensing, zoning, building code, and criminal law

provisions. Nevertheless, all of the provisions are aimed at regulation of adult entertainment in Anne Arundel County. Nowhere does the Anne Arundel County Charter state that its ordinances must cover only one specific topic of law (ie., licensing, land use, criminal) . Rather, the Charter limits the scope of an ordinance to "one subject". Bill 98-91 clearly concentrates on the subject of adult entertainment and how to prevent any negative secondary effects that may accompany it. Based on the cases interpreting the "one subject" limitation and the language of the ordinance at issue we hold that the focus on adult entertainment in Bill 98-91 satisfies the limitation imposed by the County Charter.

Vii.

Finally, appellant argues that the trial court abused its discretion when it granted the interlocutory injunction.

The grant or denial of an interlocutory injunction is a matter within the sound discretion of the trial court and will not be disturbed on appeal unless the court has abused that discretion. Teferi v. DuPont Plaza Associates,, 77 Md.App. 566, 578 (1989).

Generally, a trial court must consider four factors in determining whether the entry of the interlocutory injunction is proper: (1) the likelihood that the requesting party will succeed on the merits; (2) the "balance of convenience," determined by whether greater injury would result to the opposing party by granting the injunction than would result from its refusal; (3) whether the requesting party will suffer irreparable injury unless the injunction is granted: and (4) the public interest. Department of Transportation v. Armacost, 299 Md. 392, 404-05 (1984).

In the case sub judice, however, the County was relieved of proving irreparable injury, because that factor applies only when private parties are the plaintiffs. Joy v. Anne Arundel County, 52

Md.App. 653, 660 (1982). "In litigation between the government and a private party, the court is not bound by the strict requirements of traditional equity as developed in private litigation." State Dei3artment v. Baltimore County, 281 Md. 548, 555 (1977). The absence of the need to consider irreparable injury is the result of the principle that the government acts on behalf of all the citizens within its jurisdiction "to enforce their right to require conformity with the ordinance as the quid pro quo for their own submission to the restrictions." Joy, 52 Md.App. at 660. (applying this principle to an injunction issued as a result of noncompliance with a zoning ordinance.)

In his oral ruling, Judge Goudy stated the following:
[I]t appears to the Court that the County's interest is reasonable. And, the new statute provides for reasonable restraints and restrictions upon. . . a business of this nature. . . . I find that the sexual activity . . . is described. . . to a sufficient degree to fall under a licensing statute. That the fee that is charged. . . there's been no evidence that the fee is unreasonable. . . . And, I f ind that the public. . . C, through the) County [,] has a right to have its laws enforced and that it's inferred that a reasonable inference that harm will come to the County if they are not enforced. And, that it's appropriate for the Court to continue the injunction on an interlocutory basis.

The court also issued a written order to support its oral findings which stated:

(1) It is likely that the Plaintiff Anne Arundal County will succeed on the merits of its Complaint that the Defendant Annapolis Road, Ltd. is operating an "adult film arcade" as def ined in. . . the Anne Arundel County Code without a valid Class Y license issued by the County. . . ;

(2) Greater injury would be done by refusing issuance of this injunction than would be done to the Defendant by granting the injunction, this Court having found that the Defendant [Annapolis Road] did reopen its adult film arcade without a valid Class Y license, and that maintenance of the status quo dictates that the adult film arcade remained closed until a valid Class Y license is issued, and

(3) Plaintiff Anne Arundel County would suffer irreparable injury unless the injunction is granted in order to protect the integrity of its licensing scheme intended to deter illicit sexual conduct in such adult film arcades; and

(4) The public interest compels issuance of the injunction to prevent the Defendant Annapolis Road, Ltd. from operating an adult film arcade until it complies with the requirements of the County's licensing ordinance.

Judge Goudy's conclusions reflect adequate consideration of the factors enumerated above. After listening to the evidence presented by the County and Annapolis Road, he concluded, contrary to the claims of appellant, that the licensing ordinance was not facially invalid and did not infringe upon the constitutional rights of Annapolis Road. Therefore, it was likely that the County would succeed on the merits.

Likewise, he found that greater injury would be done to the community by refusing the injunction than to Annapolis Road by granting the injunction. At the hearing, Annapolis Road failed to present any evidence to indicate how its business had suffered as a result of the injunction. Indeed, the injunction only forced the shut down of the adult film arcade operation. The rest of the store remained open for business, enabling Annapolis Road to continue its dissemination of adult films and videotapes by means other

than the adult film arcade. The injunction did not unduly restrict appellant's ability to run its business and inconvenienced it less than if the adult film arcade operation had continued and the surrounding neighborhoods suffered nuisance and deterioration arising as a result of the promotion of illicit sexual conduct in the peep show booths of the establishment owned by Annapolis Road.

Although technically it was not required to do so, the court also determined that the County would suffer irreparable injury if the injunction was not granted. Judge Goudy found that the County's inability to administer its licensing scheme would damage the public's right to have its laws enforced. The order supported this position, stating that the injunction was necessary "to protect the integrity of . . . [the County's] licensing scheme intended to deter illicit sexual conduct in such adult film arcades." Indeed, we are reluctant to deny that a failure by the courts to enforce valid laws established by elected representatives of the public injures the government's ability to execute the will of the people. Therefore, we shall not disturb the court's finding concerning irreparable injury.

The court found that the public interest at stake compelled issuance of the injunction. The evidence, both specific to this case and in general, supports the court's findings. The preamble of the ordinance states the public's interest in preventing the undesirable "secondary effects" which often accompany adult film arcades. Existence of these secondary effects, such as neighborhood blight, nuisance, and deterioration, are welldocumented. See e.g., FWIPBS, Inc., 493 U.S. at 236; Renton, 475 U.S. at 49; Young, 427 U.S. at 54-56. We shall not underestimate the County's need to preserve the decency of its neighborhoods for the benefit of the public by finding an abuse of discretion.

Therefore, having satisfied the factors required for issuance, we hold that the trial judge did not abuse his discretion in granting

the interlocutory injunction.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.

ANNAPOLIS ROAD, LTD.	*	In the
	*	Court of Appeals
	*	of Maryland
V.		
	*	Petition Docket No. *580*
	*	September Termp 1993
ANNE ARUNDEL COUNTY MARYLAND	*	(No. 134, Sept. Term 1993, Court of Special Appeals)

* * * * * * * * * **
* * *

ORDER

Upon consideration of the petition for a writ of certiorari to the court of special Appeals and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

_____

Chief Judge

Date: March 9, 1994

IN THE SUPREME COURT OF THE UNITED STATES

ANNAPOLIS ROAD LTD.,
Petitioner

vs.

ANNE ARUNDEL COUNTY, MARYLAND
Respondent

October Term, 1993
No. _____

CERTIFICATE OF SERVICE

I, the undersigned being a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that I served 2 copies of the attached Petition for Writ of Certiorari upon the Respondent by depositing the same in the United States mail, first class postage prepaid, addressed to its counsel of record and by statute, this 7th day of June 1994, as follows:

TO: JUDSON P. GARRETT, JR., ESQ.
County Attorney

and

DAVID A PLYMYER, ESQ.
Deputy County Attorney
Office of Law
44 Calvert Street
Annapolis, Maryland 21401
(410) 222-1316

Respectfully Submitted,

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Towson, Maryland 21204
(410) 821-6868
Counsel for Petitioner

(2)

No. 93-1953

Supreme Court, U.S.
FILED
JUL 13 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ANNAPOLIS ROAD,

Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

On Petition for Writ of Certiorari
To the Court of Special Appeals
Of the State of Maryland

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JUDSON P. GARRETT, JR.
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July 13, 1994

34pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Does the interlocutory decision of the Maryland Court of Special Appeals, an intermediate appellate court, constitute a final decision supporting further review by this Court pursuant to 28 U.S.C. 1257(a)?

2. Does the decision of the Maryland Court of Special Appeals that a local government in Maryland may place time, place and manner restrictions on sexually-oriented businesses such as adult film arcades ("peep shows") conflict with this Court's holding in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)?

3. Was the construction by the Maryland Court of Special Appeals of the adult film arcade licensing ordinance consistent with the holding of this Court in FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d. 603 (1990) that such ordinances contain adequate procedural safeguards?

4. Did the injunctions prohibiting the unlicensed operation of Petitioner's unlicensed adult film arcade abridge rights secured under the First Amendment to the United States Constitution?

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No. 93-1953

In The

Supreme Court of the United States

October Term, 1993

ANNAPOLIS ROAD, LTD.,

Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

On Petition For Writ Of Certiorari
To The Court of Special Appeals
Of The State of Maryland

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anne Arundel County, Maryland, hereby opposes the petition for a writ of certiorari to review the judgment of the Court of Special Appeals of the State of Maryland.

STATEMENT OF THE CASE

Petitioner, Annapolis Road, Ltd., is a corporation which owns and operates an "adult" bookstore in Anne Arundel County, Maryland. In addition to the retail sale and rental of videotapes and the sale of periodicals, the bookstore contains nine booths designed for private, coin-operated viewing of videotapes. (Resp. Appendix at p. 5.) Respondent Anne Arundel County is a political subdivision of the State of Maryland.

On December 3, 1992 Anne M. Hatcher, Chief of Licensing for the Anne Arundel County Department of Inspections and Permits [now known as the Department of Planning and Code Enforcement], inspected the bookstore and discovered an adult film arcade ("peep show") operating without a County Adult Film Arcade (Class Y) license. (Pet. Appendix at p. 67.) The County filed suit in the Circuit Court for Anne Arundel County requesting ex parte, interlocutory, and final injunctive relief. (Pet. Appendix at pp. 35-42.)

First an ex parte injunction (temporary restraining order) and then an interlocutory injunction were issued by the Circuit Court for Anne Arundel County restraining operation of the adult film arcade without a license. (Pet. Appendix at pp. 50-60.) The injunctions do not affect the bookstore's activities other than the adult film arcade. (Pet. Appendix at p. 74.)

As permitted by the Maryland Rules, an immediate appeal was taken to the Maryland Court of Special Appeals contesting the issuance of the ex parte and interlocutory injunctions. (Pet. Appendix at p. 62.) The issuance of the injunctions was affirmed by the Maryland intermediate appellate court in an unreported decision under Annapolis Road, Ltd. v. Anne Arundel County, Maryland No. 134, September Term, 1993 (Md. Ct. Spec. App. November 3, 1993). (Pet. Appendix at pp. 63-90.) A petition for writ of certiorari before the Maryland Court of Appeals was denied by an unreported order dated March 9, 1994. (Pet. Appendix at p. 91.) The Petitioner asks for review of the judgment of the Court of Special Appeals by this Court pursuant to 28 U.S.C. 1257(a).

There has been no stay of the proceedings in the Circuit Court for Anne Arundel County, in which the Respondent seeks a final injunction preventing the Petitioner from operating an adult film arcade without a County license. The trial on the merits of the claim for a final injunction is scheduled for July 19, 1994, and the Petitioner bookstore has raised by answer to the complaint its challenge to Bill No. 98-91 on various constitutional grounds.

On June 15, 1993 Petitioner filed a separate action in the Circuit Court for Anne Arundel County for Anne Arundel County under Case No. C-93-04789 OL seeking a declaration that Bill No. 98-91 is unconstitutional on its face and as applied to the Petitioner. That matter also remains pending in the Circuit Court for

Anne Arundel County.

The decision of the Court of Special Appeals recites some of the history of this matter. That history includes prior litigation.

On July 15, 1991, Anne Arundel County Council Bill No. 68-91 was introduced before the Anne Arundel County Council. The purpose of Bill No. 68-91 was to impose a "moratorium" on the issuance of County amusement licenses for private film-viewing machines, popularly referred to as "peep shows". The legislation sought to halt the issuance of new or renewed licenses until specific standards for the location and operation of such devices could be promulgated. Bill No. 68-91 was signed into law on August 7, 1991, took effect the same day, and provided that the moratorium would remain in effect until December 1, 1991. (Pet. Appendix at p. 65.)

On July 29, 1991, Chief of Licensing Hatcher made her first inspection of the Petitioner's business. Hatcher notified Alan Stokes, the manager, that a County license was required to operate the private film-viewing machines on the premises, and gave him a copy of the license application form. (Pet. Appendix at p. 65.) Store manager Stokes testified that he voluntarily shut down the private film-viewing machines. Id.

On August 1, 1991, Petitioner filed applications for licenses for its private film-viewing machines under the law then in effect. (Pet. Appendix at p. 65.) The original filing was procedurally

incomplete, and the applications were returned. An August 6 resubmission was similarly incomplete. On August 7, 1991, the moratorium enacted by Bill No. 68-91 went into effect, and the County took no further action on the applications for licenses. (Id. at p. 66.)

On August 13, 1991, Petitioner and Stokes filed suit in the United States District Court for the District of Maryland under Annapolis Road, Ltd., et al. v. Anne Arundel County, Maryland, et al., Civil No. S 91-2271, alleging inter alia that the moratorium and the actions of Hatcher violated rights secured to them by the First Amendment. (Resp. Appendix at p. 4.) On September 11, 1991 the District Court entered an opinion and order dismissing the entire complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. (Id. at p. 5.) The dismissal was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit in Annapolis Road, Ltd. v. Hagner, No. 91-1205 (4th Cir. June 2, 1992) (per curiam), reh'g denied June 22, 1993. (Id. at p. 14.) The Fourth Circuit found that the bookstore's claim of prior restraint lacked validity, as the bookstore had failed to demonstrate any "apparent communicative interest" promoted by the display of films or videotapes in peep show booths which could not be promoted with equal success by the rental or sale of those films and tapes over the counter, activities unaffected by the moratorium. (Id. at pp. 10-11.)

On November 21, 1991 a second ordinance, Anne Arundel County Council Bill No. 98-91, went into effect. (Pet.

Appendix at p. 66.) This ordinance set new standards for licensing the film-viewing machines, which no longer were licensed individually, but were licensed collectively as an "adult film arcade." Id. The moratorium imposed by Bill No. 68-91 expired on December 1, 1991, and the Petitioner was free to reapply for an adult film arcade license under the standards enacted by Bill No. 98-91. Id.

The Petitioner elected not to file an application for an adult film arcade license. Instead, at some point in time Petitioner reopened its peep shows without the benefit of a license, and the events which lead to the issuance of the injunctions followed. (Pet. Appendix at p. 67.)

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied on the following grounds: 1) The decision below did not finally decide the federal issues, and these issues may be resolved or mooted at the trial on the merits and in any subsequent appeals in the Maryland courts; 2) the Respondent County's Adult Film Arcade ("peep show") licensing ordinance constitutes a time, place and manner restriction on a sexually-oriented business rather than a "prior restraint" on protected expression; 3) the Maryland Court of Special Appeals rejected a construction of County law which would have conferred broad discretion on administrative officials to deny applications for adult film arcade licenses; and 4) the Petitioner placed nothing in the record suggesting that the injunction inhibited its ability

to disseminate ideas to the public, as that part of the Petitioner's business which included the sale and rental of videotapes for off-premise use was unaffected by the injunctions.

I. The Decision Of The Maryland Court Of Special Appeals Did Not Finally Resolve The Federal Claim, And The Federal Constitutional Issues Presented By The Certiorari Petition May Be Mooted Or Resolved In Further Proceedings On The Merits In The State Court.

Petitioner seeks a writ of certiorari to review the decision of the Maryland Court of Special Appeals affirming ex parte and interlocutory injunctions issued by the Circuit Court for Anne Arundel County. Petitioner appealed the issuance of the injunctions pursuant to a Maryland statute which permits appeals from certain interlocutory orders, including orders granting or dissolving injunctions.[1] The case has returned to the Circuit Court for Anne Arundel County, where it awaits a trial on the merits of the Respondent's complaint for final injunctive relief.

One of Petitioner's central contentions is that the licensing fee imposed by the ordinance on adult film arcades is a content-based "tax" on speech in violation of Forsyth County v.

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[1] Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-303(3)(i).

Nationalist Movement, 505 U.S. ____, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). (Pet. at p. 12.) The Court of Special Appeals specifically declined to address this issue on its merits, based on Petitioner's inartful examination of the County's Chief of Licensing. (Pet. Appendix at p. 82.) Consequently, Petitioner will have an opportunity to revisit this matter at the trial on the merits.

Furthermore, the Court of Special Appeals invited the Petitioner to resolve the fee issue on state law grounds, which would render moot the federal question: The Court pointed out that, under well-settled Maryland law, courts may review a fee imposed by a regulatory measure to determine if the amount is reasonable and if it has a definite relation to the regulatory purpose. (Pet. Appendix at p. 84.) See County Commissioners of Anne Arundel County v. English, 182 Md. 514, 520, 35 A.2d 135, 138 (1943). If the amount of the fee exceeds the regulatory costs, the fee is invalid. See Ocean City v. Purnell-Jarvis, Ltd., 86 Md.App. 390, 404-405, 586 A.2d 816, 823 (1991).

II. The Trial And Appellate Courts Were Correct In Concluding That Anne Arundel County's Adult Film Arcade Ordinance Constitutes A Valid Time, Place And Manner Restriction On A Sexually-Oriented Business.

Petitioner describes the licensing ordinance as a prior restraint on expression rendered unconstitutional by Near v. Minnesota, 283 U.S. 697, 51 S.Ct.

625, 75 L.Ed. 1357 (1931) and its progeny. (Pet. at p. 6.) This particular line of attack misses the mark entirely.

The licensing ordinance at issue is a time, place, and manner regulation of one type of sexually-oriented business. The Respondent concedes that if the film arcade was devoted exclusively to the exhibition of films which did not depict the specified sexual activities, a license would not be required.

It is no longer a novel idea that local governments may impose certain content-neutral restrictions on the location and operation of sexually-oriented businesses such as adult theaters and peep shows. See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). While the position which the Petitioner asks this Court to adopt is not immediately apparent, it is clear that the licensing ordinance at issue does not represent the general suppression or blanket censorship of expression proscribed in Near v. Minnesota, Vance v. Universal Amusement Company, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) and the related cases cited by the Petitioner. As described by the Maryland Court of Special Appeals:

> The ordinance focuses on requirements pertaining to one particular manner of dissemination, viewing booths located on commercial premises, rather than restriction of all adult sexually explicit material available for distribution.

(Pet. Appendix at p. 73.) (Emphasis in original).

III. The Maryland Court Of Special Appeals Properly Rejected The Petitioner's Argument That The Licensing Ordinance Conferred Unbridled Discretion On Administrative Officials.

Petitioner alleges that the licensing ordinance fails to establish specific and reasonable guidelines and criteria governing the issuance or denial of an adult film arcade license by the Respondent. (Pet. at pp. 8-10.) Petitioner urges on this Court a construction of the ordinance which was rejected by the Maryland Court of Special Appeals.

Petitioner relies heavily on general language in the Anne Arundel County Code which predates enactment of the adult film arcade licensing ordinance as evidence of the purported "unbridled discretion." In particular, Petitioner cites Article 16, §2-104 of the County Code, which confers on the Anne Arundel County Department of Planning and Code Enforcement the authority to deny an amusement license if the "operation of the devices at the proposed premises will create a nuisance or will be detrimental to the peace and welfare of the community . . . "[2] (Pet. Appendix at p. 6.)

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[2]A number of different amusement "devices" are licensed under Article 16 of the County Code, of which Adult Film Arcades are only one variety.

Concluding that the general authority of the Department of Planning and Code Enforcement to grant or deny various amusement licenses is limited by the specific provisions of the adult film arcade ordinance, the Court of Special Appeals noted that the licensing official's discretion to deny an adult film arcade license is curtailed sharply under Bill No. 98-91. (Pet. Appendix at p. 79.) In particular, Article 16, §2-1105(a), as enacted by Bill No. 98-91, mandates that: "The Director [of Planning and Code Enforcement] shall issue a Class Y license if the applicant meets the requirements of this subtitle."[3] (Pet. Appendix at pp. 18, 79.) (Emphasis added.)

The Court of Special Appeals also observed that the ordinance contained provisions assuring "expeditious review" of administrative decisions affecting adult film arcade licenses. (Pet. Appendix at pp. 77, 80.) The Court properly held that the general authority of the Director of Planning and Code Enforcement was constrained by the specific provisions of the adult film arcade ordinance, which included specific and reasonable criteria governing the issuance or denial of an adult film arcade license by the County.

The record before the Court of Special Appeals included the transcript of deposition testimony by Chief of Licensing

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[3]The applicable subtitle is Subtitle 11, which deals only with Class Y (adult film arcade) licenses.

Hatcher in which she described how her agency generally determined whether an amusement device would be "detrimental to the peace and welfare of the community." (Pet. Appendix at p. 79.) In addition to reiterating the observation by the Court of Special Appeals that Hatcher's discretion is limited by the plain language of the ordinance, Respondent also points out that Petitioner is in a position only to raise a challenge to the facial validity of the ordinance; Petitioner has not applied for an adult film arcade license under the ordinance enacted in 1991.[4] (Pet. Appendix at p. 67.) Any conjecture as to how Hatcher may implement the new Class Y licensing requirements is immaterial.

IV. The Maryland Court Of Appeals Properly Held That The Injunctions Did Not Abridge The Rights Of The Petitioner Under The First Amendment.

The Court of Special Appeals also found that the injunctions did not abridge the First Amendment rights of the

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[4]Petitioner's historical references to the "private film-viewing machine" licensing ordinance in effect prior to the enactment of Bill No. 98-91 have no bearing on the instant case. The Respondent admits that no licenses were issued under the ordinance in effect from 1977 through 1991. As described by the Fourth Circuit in the prior litigation, Bill No. 98-91 is substantially different from the licensing ordinance previously in effect. (Resp. Appendix at p. 8.)

Petitioner, on the basis that the injunction left the Petitioner with "reasonable alternative means of communication": The Petitioner failed to produce any evidence that the type of speech promoted by the adult film arcade differed from that contained in the videotapes sold and rented at the bookstore. (Pet. Appendix at p. 74.) The Court of Special Appeals adopted the reasoning of the United States Court of Appeals for the Fourth Circuit, which had held that the moratorium ordinance imposed by Bill No. 68-91 did not constitute a prior restraint because the Petitioner had failed to suggest an "apparent communicative interest" promoted by the peep show machines which could not be promoted with equal success by the rental or sale of the same videotapes. (Id. at pp. 74-75.) Paraphrasing the language of this Court, it may be that the First Amendment's protection of expression is implicated by the injunctions, but the Petitioner has placed nothing in the record to suggest that it is abridged. See, e.g. City of Lakewood v. Plain Dealer, 486 U.S. 750, 769, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for write of certiorari be denied.

Respectfully submitted,

Judson P. Garrett, Jr.
County Attorney

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

28 U.S.C. §1257(a)

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

LAWS OF ANNE ARUNDEL COUNTY, MARYLAND
Bill No. 68-91

AN EMERGENCY ORDINANCE concerning: Licenses and Permits - Moratorium

FOR the purpose of establishing a moratorium on the issuance or renewal of Class Y licenses

WHEREAS, Article 16, Title 2, Subtitle 11 of the Anne Arundel County Code provides for the issuance of a Class Y license for film-viewing machines; and

WHEREAS, the Code does not specify any standards for the location, operation, or regulation of these facilities; and

WHEREAS, the County Council believes that there should be guidelines in place to assist the Director of Inspections and Permits in the issuance of Class Y licenses; and

WHEREAS, the County Council further believes that a review of the law regulating these licenses should be undertaken in order to determine if it provides guidelines that suitably address the interests of the citizens of Anne Arundel County; and

WHEREAS, the County Council further believes that these guidelines and standards should be enacted prior to the issuance or renewal of any additional Class Y licenses; now, therefore,

SECTION 1. Be it further enacted by the County Council of Anne Arundel County, Maryland, That the Department of Inspections and Permits may not issue or renew a Class Y license until December 1, 1991.

SECTION 2. And be it further enacted, That this Ordinance is hereby declared to be an emergency ordinance and necessary for the immediate preservation of the public peace, health, safety, welfare, and property, and being passed by the affirmative vote of five members of the County Council, the same shall take effect from the date it becomes law.

APPROVED AND ENACTED: August 7, 1991

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANNAPOLIS ROAD, LIMITED, A DELAWARE CORPORATION; ALAN STOKES,

Plaintiffs-Appellants,

v.

DARRYL R. HAGNER, Detective, Anne Arundel County Police; ROBERT P. RUSSELL, Chief, Anne Arundel County Police; LEROY JONAS, Director, Department of Inspections and Permits; ANNE M. HATCHER, License Administrator; ROBERT R. NEALL; ANNE ARUNDEL COUNTY, MARYLAND, a Body Politic by Charter,

Defendants-Appellees.

No. 91-1205

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-91-2271-S)

Argued: April 8, 1992

Decided: June 2, 1992

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William Edward Seekford, Towson, Maryland, for Appellants. David Alan Plymyer, Deputy County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellees. **ON BRIEF:** Judson P. Garrett, Jr., County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

I.

Annapolis Road, Ltd., a corporation which owns and operates an "adult" bookstore and coin operated video facility, and Alan Stokes, the manager of the bookstore ("appellants"), filed claims pursuant to 42 U.S.C. § 1983 and § 1988 against Anne Arundel County, Maryland, and certain county officials ("appellees"), alleging that the application and threatened application to them by appellees of various statutes had violated or would violate their First and Fourth Amendment rights. The first two statutes were county ordinances, one involving licensing criteria, and the other imposing a six-month moratorium on future licenses. The other pair of statutes were statutes of the state of Maryland prohibiting the display or depiction of sexual conduct for advertising purposes. Appellants alleged that the statutes, or the threatened application of them, constituted prior restraint of their First Amendment rights, and denial, suppression and abridgment of other constitutional protections.

Appellants filed their claim on August 13, 1991. Appellees filed a response alleging a failure on the part of appellants to state a claim

upon which relief could be granted. On September 11, 1991, the district court entered an opinion and order dismissing the entire complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Appellants filed a timely notice of appeal.

II.

Appellants own and operate an "adult" bookstore which retails books, magazines, newspapers, and videos which include pictures displaying explicit sexual acts on their covers. In addition, the store contains nine single patron coin-operated video booths, better known as "peep-show" booths.

On May 11, 1984, appellee Darryl Hagner, a detective with the Anne Arundel County Police Department, seized a number of books, magazines and films from the store pursuant to Article 27, Section 416-D of the Maryland Code, which prohibits the public display of depictions of certain sexual acts. Appellants were convicted of various counts of displaying those materials, but the bookstore remained in business.

On July 15, 1991, Bill #68-91, a bill to impose a moratorium on the issuance of amusement licenses ("Class Y" licenses) for private viewing machines (the peep-shows booths), was introduced before the Anne Arundel County Council. The reason for the codification of Bill #68-91 was the county's belief that the existing amusement licensing ordinance, §§ 2-1101 - 2-1110 of Article 16 of the Anne Arundel County Code, were insufficiently specific as to location and operation standards for peep-show parlors. Bill #68-91 sought to halt the issuance of new or renewed licenses until such standards could be promulgated. The Bill was signed on August 7, 1991, and took effect that same day, and was set to remain in effect until December 1, 1991.

Previously, on July 29, 1991, appellee Hagner and appellee Anne Hatcher, an officer of the County Department of Inspection and Permits, made an inspection of appellants' bookstore. The two found peep-show machines that were not covered by Class Y licenses. Hatcher gave an application for Class Y licenses to appellant Stokes.

In an attempt to avoid further trouble with the law, appellants closed the bookstore on August 1, 1991, and completed and filed applications for licenses for their peep-show machines. The original filing was procedurally incomplete, and the application was returned for resubmission. The August 6 resubmission was similarly incomplete. On August 7, 1991, Bill #68-91, the "moratorium" ordinance, took effect, and pursuant to it, the county took no further action on appellants' application for licenses.

On November 21, 1991, Bill #98-91, a measure which set the new standards for amusement licenses sought in Bill #68-91, went into effect. Appellants were soon free to apply for a new license under Bill #98-91, because the moratorium under Bill #68-91 expired as of December 1, 1991.

Appellants sought declaratory and injunctive relief based on various alleged causes of action. First, appellants alleged that Article 27, Sections 416, and 418[1] of the Maryland Code were unconstitutionally enforced or threatened to be enforced by County officials. Specifically, appellants contended that individual appellees under color of the State law had, in 1984, sought and obtained illegal search warrants to seize material, and now threatened to do so again.

Second, appellants have argued that the new Class Y licensing provision, enacted pursuant to Bill #98-91, is unconstitutional as a prior restraint on speech. Additionally, appellants allege that the activities of County officials constituted violations of 42 U.S.C. § 1983 because they caused a violation of appellants' clearly established constitutional and statutory rights and those of their patrons and employees.

The district court on September 11, 1991, dismissed all claims made by appellants. In so doing, the court ruled that: 1) appellants had not demonstrated, even by unilaterally closing their store, a sufficient cause for declaratory relief as against the nebulous threat of seizure and/or prosecution in the absence of a showing of a present objective harm or threat of some future harm real enough to justify declaratory relief; 2) there was no justiciable cause of action regarding the Class

[1]Section 418 is a restriction on the sale of "obscene" material.

Y licensing ordinance, because it was not yet in effect;[2] 3) there was no justification for any claim of damages by appellants based on a single lawful inspection by County officials; 4) the restriction set out by the moratorium provision was not a prior restraint as it constituted a permissible time, place and manner restriction on sexually explicit coin operated video machines; and 5) the moratorium provision did not constitute a due process violation justifying a constitutional challenge.

Aspects of the district court's ruling have been mooted by the expiring of Bill #68-91 (the "moratorium" provision) and the codification of Bill #98-91 (the new Class Y licensing standards provisions).

III.

A. *Mootness of Licensing Claim*

Anne Arundel County Bill #98-91 repealed the provisions of Article 16, §§ 2-1101 through 2-1110 effective on November 21, 1991. Those provisions had governed the application and granting requirements for Class Y licenses. Appellees have contended that appellants' claims regarding county licensing ordinances are mooted by the reversal and replacement of §§ 2-1101 — 2-1110. Although appellants have cited deficiencies in statutory provisions which remain on the books following the enactment of Bill #98-91, appellees' contention that the relevant provisions of §§ 2201 — 2110 have been substantially repealed is correct.

The basis of appellants' claims that the previous licensing statute constituted a violation of their constitutional rights was their assertion that the provision assigned too much discretionary power to the Licensing Director, and did not provide statutory guidelines or standards to govern his or her determinations. The new licensing provisions, as altered by §§ 2-1105, 1107, 1108, 1109, and 1110 of Bill #98-61, however, provide significant additional statutory guidelines

[2]At the time of its ruling the district court was correct as to the effectiveness of the Class Y licensing ordinance. But as of November 21, 1991, a new ordinance has been in effect.

to govern the Director's activity, and to identify the prohibited acts of licensees. The new guidelines include: an additional time limit for issuance determinations by the Director; a requirement that the Director give reasons in writing for any negative issuance determination; specific organizational, personnel and equipment requirements for licensees; specific guidelines governing license renewal and revocation; a more specific demarcation of prohibited acts of licensees; and a right to immediate appeal for unsuccessful applicants for renewal.

The new licensing statute thus provides substantially different requirements than those set out in the previous statute, upon which appellants' claim is based. In *Maryland Highway Contractors v. State of Maryland*, 933 F.2d 1246 (4th Cir. 1991), we ruled that when a statute that forms the basis for a complaint is repealed and replaced by another statute, particularly one that seeks to respond to the defects in the previous statute at issue in the complaint, the revision of the original statue has the effect of rendering the complaint moot. *Id.* at 1449-1450.

Accordingly, the revision of the Class Y licensing provision, providing significant additional limitations on discretionary activity by the Director, and providing specific standards to govern licensing activity, moots appellants' claims involving the enforcement and threatened enforcement of the previous statute.

B. *The Moratorium*

There are, however, issues not mooted by the repeal of the original licensing statute. The moratorium provision of Bill #68-91 was the statutory provision that affected appellants' license rights in the present case. Appellants were denied their application for a Class Y license not because of the provisions of the previous licensing statute, but because of the edict of Bill #68-91 which set up a moratorium on issuing licenses which took effect one day prior to appellants' procedurally sufficient application. Accordingly, we must address the issue of the County's failure to grant the Class Y license, and whether the moratorium provided for in Bill #68-91 constituted a basis for a § 1983 claim by appellants.

Two allegations must be made out to state a cause of action for a § 1983 claim. "First, the plaintiff must allege that some person has

deprived him of federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The second prong of the test is met here, in that the government action in question, the moratorium required by the County statute, arises as under the color of territorial law. *See West v. Atkins*, 487 U.S. 42, 49 (1988) (when an official exercises power which is possessed by virtue of state law, "color of state law" requirement is met). The only remaining issue, therefore, is whether appellants have alleged harm which constitutes deprivation of a federal right.

The only apparent direct discussion of the propriety of the County's moratorium in appellants' brief on appeal, is their assertion, supported by precedent, that there is a presumption that their rights to sell printed material and to exhibit film, and the rights of others similarly situated, are protected by the First and Fourteenth Amendment. Appellants' assertion is indisputable. The fact that sexually explicit material may engender negative response from the majority of a legislature or community does not serve to withdraw all First Amendment protections from its purveyors. It is also clear, however, that a state or local entity has the authority to promulgate reasonable regulations regarding the sale of such material, as long as the government action does not place a prior restraint, undue burden, or harmful chilling effect on a selling party's freedom of expression.

Appellees contend that no such burden or restraint was occasioned by the moratorium on issuance of new Class Y licenses. As stated previously, appellants' bookstore provided two relatively distinct services to its customers. First, it made available for sale or rent pictorial and video explicit sexual material that a customer could transport out of the store. Additionally, the store had on site "peep-show" machines that provided the viewer, after inserting coins, the opportunity to view sexually explicit material on the store's premises. The Class Y license requirement extended to only the latter service, and the lack of the license did not restrict, in any way, appellants' ability to market or otherwise provide its material in any other manner than through the "peep show" forum. Accordingly, the County moratorium provision did not involve a direct content-based restriction on all of the speech promoted by appellants, but merely imposed a limited restriction on

the time or manner through which the sexually explicit material could be presented to the public.

In *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the Supreme Court addressed the issue of the potential prior restraint effect of state licensing and zoning regulations which restricted the commercial projection of sexually explicit films. In determining that the regulations did not constitute an unreasonable restraint on free speech, the Court opined that:

> The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments . . . The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances . . . *we are also persuaded that . . . [the] restriction does not, in itself, create an impermissible restraint on protected communication.*

Id. at 62 (emphasis added).

The point highlighted by the Court in *Young*, and of relevance in the present case, is that the facility of communication, and not communication in any particular form, is the focus of First Amendment protection. To the extent that appellants were able to show that there was an essential communicative element provided by the "peep-show" machines that could not be replaced by other material available in the store, its claim of prior restraint would perhaps have significant validity. Yet here there is no apparent communicative interest, and appellants fail to suggest one, promoted by the peep show booths that could not be promoted with equal success by the renting or sale of other explicit material.[3] *See also Renton v. Playtime Theaters, Inc.*,

[3]Appellants have supported their claim that the restriction on its in-house showing of videos constituted a prior restraint with irrelevant statistics about loss of profit. The fact that appellants are likely to become significantly

475 U.S. 41, 53 (1986) (allowing zoning restriction on adult theaters as long as the restrictions provide "reasonable alternative avenues of communication ..." for the explicit material), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (allowing the closing of a bookstore, and ruling that the potential burden on First Amendment rights was "mitigated by the fact that respondents remain free to sell the same materials at another location.").

In addition to the foregoing, it must be reasserted that the moratorium provision at issue here served to restrict appellants' expression for less than four months, for the specific purpose of promulgating more specific guidelines for the issuance and review of Class Y licenses, a necessity highlighted in appellants' own argument. Appellants, after the approximately four month moratorium expired, were free to re-apply for a Class Y license, under the new licensing requirements, and resume their commercial use of peep-show booths.[4]

The limited restriction on the manner of communicating sexually explicit material imposed by the moratorium ordinance did not impermissibly restrict the First Amendment rights of appellants justifying a conclusion that their federal rights were violated. Accordingly, the district court properly determined that appellant's § 1983 complaint concerning the moratorium failed to state a claim upon which relief could be granted.

C. *Enforcement of Anti-Obscenity Statutes*

Appellants have claimed that they are threatened with the unfair application of the State's anti-obscenity statutes.[5] They did not claim

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more wealthy through the use of the peep show booths, than merely from dissemination of similar material in different forms, does not inform adjudication of First Amendment issues. "The inquiry for First Amendment purposes is not concerned with economic impact." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986).

[4]While not relevant here, the shortness of the four month moratorium enhanced its reasonableness and rebutted any argument of unfairness or vindictiveness.

[5]Annotated Code of Maryland, Article 27 §§ 416D and 418.

that the statutes themselves are invalid, but asserted that Officer Hagner acted arbitrarily in enforcing the statutes in his seizure in 1984, and that he has recently made threats suggesting that he will take such unjustified discretionary action again in the future.[6]

In *Ellis v. Dyson*, 421 U.S. 426, 432 (1975), the Supreme Court, citing its opinion in *Steffel v. Thompson*, 415 U.S. 452 (1974), held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." In *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979) (citation omitted), the Court held that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute." The question on appeal, therefore, is whether the appellants have indicated a genuine, non-imaginary or non-speculative threat that the statutes in question will be enforced in an unconstitutional manner.

A recent decision by a Maryland appellate court directly addressed the type of search and seizure performed by Officer Hagner in 1984 in appellants' store pursuant to § 416D, and concluded that "[t]he Fourth Amendment does not permit the issuance of a warrant that leaves it entirely to the discretion of the officers conducting the search to decide what items are obscene and are therefore subject to seizure." *Randall Book Corp v. State*, 497 A.2d 1174, 1180 (Md.App. 1985). Subsequent to the decision in *Randall*, a police officer is not imbued with the kind of arbitrary authority allegedly exercised by Hagner in 1984, when he determined the propriety of displayed material, and feared by appellants in the future. Prior to *Randall*, concern about a repeat of the arbitrary seizure carried out in 1984 might have been considered something other than speculative. But given the Maryland Court of Appeals specific indication of the proper procedure, a con-

[6]Specifically, the officer was alleged to have commented during his recent inspection of the bookstore premises: "I see you have some of those materials that aren't supposed to be here."

clusion that the past, now disfavored, activity would be likely to be repeated is highly speculative.

Given the extreme unlikelihood that the feared unconstitutional enforcement of the State statute alleged by appellants will occur, the district court properly determined that appellants did not have standing to bring their claims for relief concerning the State statutes.

D. *Other 1983 Claims*

Section 1983 liability for a municipality, like Anne Arundel County in the present case, only applies "where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. It is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983." *Canton v. Harris*, 489 U.S. 378, 385 (1989) (citations omitted).[7] The only factual precedent provided by appellants to support its complaint against the County is the isolated activity of one police officer seven years in the past. Such an isolated action is clearly insufficient to support a § 1983 claim against the County. Much more significant and general activity on the part of a police force has been held not to provide basis or a § 1983 claim, because such activity failed to indicate "deliberate indifference to the rights of persons with whom the police come into contact" on the part of the police force as a whole. *Id.* at 388.

Accordingly, the district court properly dismissed appellants' claim against the County and the County officials.[8] The district court's dis-

[7]Appellants brought additional charges against five appellees in their official capacity. Such suits are adjudicated within the same principles of law that apply to suits against a municipality itself. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-92 (1978); *Giancola v. State of West Virginia Dept. of Public Safety*, 830 F.2d 547, 550 (4th Cir. 1987). Accordingly the officers will not be held liable in their official capacity unless the municipality is found to be liable.

[8]Appellant makes additional claims against Appellees Hagner and Hatcher personally. The claim against Hagner provides no factual support for a conclusion that he participated in any violation of a federal right enjoyed by appellant since the seizure incident in 1984. Appellants have exhausted any

missal of appellants' claims in the present case should be affirmed.

AFFIRMED

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claim regarding that incident in an unsuccessful past federal action. The claim against appellee Hatcher focuses on her letter sent to appellants denying their license on August 8, 1991, because of the imposition of the moratorium. But since we have concluded that the moratorium and its application did not violate appellants' constitutional rights, it is clear that Hatcher can not be held liable for a constitutional violation in participating in the application of the moratorium.